AVOIDING NORMATIVE CANONS IN THE REVIEW OF ADMINISTRATIVE INTERPRETATIONS OF LAW: A *BRAND X* DOCTRINE OF CONSTITUTIONAL AVOIDANCE

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TABLE OF CONTENTS

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This Article explores the conflicting commands of modern constitutional avoidance (courts must construe ambiguous statutes not only to adopt a constitutional construction but to avoid constructions that raise constitutional questions) and *Chevron* deference (courts must defer to an agency's reasonable interpretation of an ambiguous statute it administers). While courts and commentators have suggested that constitutional avoidance trumps *Chevron* deference (at either step one or two), this Article advocates that modern constitutional avoidance should play no role in the review of administrative interpretations of law. Once Congress has empowered an agency to interpret an ambiguous statutory provision, a court cannot simply invalidate the agency's interpretation and replace it with one the court believes better avoids constitutional questions.

Instead, if an agency's reasonable interpretation raises constitutional questions, a court must determine whether the interpretation is indeed unconstitutional and thus an impermissible interpretation at *Chevron* step two. This approach, in essence, constitutes a return to the classical doctrine of constitutional avoidance, and it finds support in the Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*. As the Article illustrates in a variety of administrative contexts, this *Brand X* doctrine of constitutional avoidance balances the comparative strengths of courts and agencies and is necessary to preserve a proper separation of powers between the courts, the Executive, and Congress. It is also justified under Dean Edward Rubin's network theory of administrative law.

INTRODUCTION

If a statute is susceptible to more than one reasonable interpretation, the (modern) doctrine of constitutional avoidance commands courts to construe the statute to avoid an interpretation that raises serious constitutional problems.[1] This canon of statutory construction has its share of advocates

1. *See, e.g.*, Jones v. United States, 526 U.S. 227, 239 (1999) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter." (quoting United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366,

as well as opponents. Advocates underscore that, in addition to advancing the Judiciary's prudential interest in not reaching difficult constitutional questions, the doctrine helps maintain a proper separation of powers between the Judiciary and Congress, owing proper deference to legislative supremacy.[2] As the Supreme Court has noted, "the doctrine serve[s the] basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made."[3] Constitutional avoidance thus reinforces the notion that each branch of government has a duty to uphold the Constitution, with the assumption that Congress intends to pass constitutional laws.

Critics, by contrast, emphasize that the doctrine, in practice, disserves both of these objectives.[4] First, the doctrine often allows courts to substitute their own interpretation for one that Congress more likely intended; it thus displaces legislative supremacy and limits Congress's ability to legislate near the constitutional limit.[5] Second, by holding that an interpretation raises certain constitutional doubts, a court has not really avoided the constitutional question but, instead, answered it indirectly, or at least tentatively,[6] with "a whisper rather than with a shout."[7] Much like a

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408 (1909))); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499–501, 504 (1979))).

2. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 348 (2000); Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 N.Y.U. ANN. SURV. AM. L. 477, 512–17.

3. Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998).

4. *See generally* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 846–65 (2001) (describing both problems in more detail).

5. *See, e.g.*, *id.* at 846–60 (illustrating the problem as seen in various cases); Harold J. Krent, *Avoidance and Its Costs: Application of the Clear Statement Rule to Supreme Court Review of NLRB Cases*, 15 CONN. L. REV. 209 (1983); Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT L. REV. 481, 488–90 (1990); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1962 (1997); *see also* Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 840 (1991) ("A court that sustains and applies a statute interpreted by reference to [the avoidance] canon surely shows no greater solicitude for legislative preferences than does a court that attempts to understand what was meant and then engages in a serious constitutional analysis of the validity of the statute."). Judge Posner is among those who share this view. *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 285 (1985); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983). *But see* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 946–47 (1992) (disagreeing with Posner).

6. *See, e.g.*, Kelley, *supra* note 4, at 860–65; Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30

preliminary injunction, this ruling can be the whole ball game. While the constitutional question remains open as a technical matter, as a practical matter neither Congress nor future litigants attempt to revisit it.[8] These criticisms have received a substantial amount of scholarly attention.[9] A third, more recent criticism, that has received less attention, is that constitutional avoidance also infringes on separation of powers by displacing the Executive's law-elaboration authority.[10]

Indeed, in the administrative context, it is unclear what role constitutional avoidance should play in the review of an agency's interpretation of a statute it administers. Consider the following example:

> *Congress passes a statute that requires the government to deport noncitizens who have been ordered removed within ninety days or it must release them on bond in the United States. Congress further provides that certain aliens, including those who would pose a danger to the public or a flight risk, may be detained beyond the ninety-day period. But the statute says nothing about how long beyond ninety days, and it provides no procedures for such continued detention.*
>
> *Invoking modern constitutional avoidance, a court interprets the statute to mean that the government may only detain a noncitizen beyond ninety days so long as the deportation is reasonably foreseeable; it holds that six months is a reasonably foreseeable period of time.*
>
> *By contrast, the Attorney General, to whom Congress has delegated authority to implement this statute, interprets the statute to allow continued detention beyond six months (and perhaps indefinitely) with respect to certain especially dangerous noncitizens—i.e., those who have been convicted of violent crimes, that due to a mental condition or a personality disorder would likely engage in acts of violence in the future, and for which no conditions of release could be expected to ensure public safety. The Attorney General also provides detailed procedural protections similar to those the Supreme Court has upheld as constitutional in the context of indefinite civil detention.*

In situations such as this, the reviewing court faces conflicting commands, or at least an order-of-battle dilemma, between constitutional avoidance and administrative deference. Under the now-familiar *Chevron* two-step approach, the court must defer to an agency's construction of a

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U.C. DAVIS L. REV. 1, 90 (1996) (stating that under "the pretense of avoidance," courts are actually making constitutional law); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 88.

7. Schauer, *supra* note 6, at 88.

8. *See, e.g.*, Marshall, *supra* note 5, at 485 (finding no instances of congressional response to an invocation of constitutional avoidance).

9. *See supra* notes 4–6 and accompanying text.

10. *See, e.g.*, Kelley, *supra* note 4, at 867–72.

statute it administers if the court finds, at step one, that "the statute is silent or ambiguous" and then determines, at step two, that the agency's reading is a "permissible construction of the statute."[11] In other words, constitutional avoidance and *Chevron* deference are both triggered once a court determines that a statute is ambiguous. Which doctrine should apply first? As this example illustrates, the answer to this question often forecloses agency action. If constitutional avoidance applies first, the court resolves the ambiguity in favor of its own interpretation and thus invalidates the agency's construction at *Chevron* step one. Conversely, if *Chevron* deference applies first, the court proceeds to *Chevron* step two, and then the question becomes whether the agency's interpretation is reasonable.

Traditionally courts and scholars have concluded that "the avoidance canon simply trumps *Chevron*," apparently at *Chevron* step one.[12] In other words, the court should construe away the ambiguity to avoid constitutional doubts and not defer to the agency's interpretation (even if the agency's interpretation is actually constitutional). At least one court[13] and one scholar[14] have more recently suggested that constitutional avoidance may trump *Chevron* deference at step two, depending on the seriousness of the constitutional questions raised by the agency's interpretation. But either conclusion raises serious separation of powers concerns, as Congress has delegated interpretative authority first and foremost to the agency. Notwithstanding, courts continue to apply modern avoidance at either *Chevron* step one or step two, and the Supreme Court has issued mixed messages on the subject.

In light of these separation of powers concerns, this Article advocates that once Congress has empowered an agency to interpret an ambiguous

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11. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

12. Kelley, *supra* note 4, at 871 (citing Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574–75 (1988)); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1023 & n.206 (1992) (same); *see also* Clearing House Ass'n v. Cuomo, 510 F.3d 105, 113 (2d Cir. 2007) ("That broader principle is rooted in the doctrine of constitutional avoidance, which the Supreme Court has recognized may, in some instances, trump the deference typically afforded to an agency's interpretation of the statute it administers."), *aff'd in part, rev'd in part*, 129 S. Ct. 2710 (2009).

13. *See* Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1251 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1011 (2009).

14. Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 93–94 (2008); *see also* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2608–09 (2006) ("[T]he executive is not permitted to construe statutes so as to raise serious constitutional doubts. This principle is far more ambitious than the modest claim that a statute will be construed so as to be constitutional. Instead it means that the executive is forbidden to adopt interpretations that are constitutionally sensitive, even if those interpretations might ultimately be upheld." (footnote omitted)).

statutory provision, a court no longer has discretion to replace an agency's reasonable interpretation with one the court believes better avoids constitutional questions. Instead, if an agency's interpretation raises constitutional questions, a court must determine whether the interpretation is indeed unconstitutional and thus impermissible at *Chevron* step two. This approach, in essence, constitutes a return to the classical doctrine of constitutional avoidance, which counseled that where a statute is susceptible to more than one interpretation, a court (or here, an agency) must choose an interpretation that is actually constitutional. While a court must strike down an administrative interpretation that is actually unconstitutional at *Chevron* step two, modern avoidance should play no role under *Chevron* step one or two.

This approach finds support from two relatively recent Supreme Court decisions. In the October Term of 2004, the Court both reaffirmed the viability of modern avoidance as "a tool for choosing between competing plausible interpretations of a statutory text" (in *Clark v. Martinez*),[15] and clarified the agency's primary role in interpreting a statute it administers (in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*).[16] The *Brand X* Court took *Chevron* one step further and held that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[17] That is because when there is an ambiguity in a statute an agency administers, there is a "presumption" that Congress "desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[18] This insight should apply with equal force to the use of constitutional avoidance under *Chevron*. Under a "*Brand X* doctrine" of constitutional avoidance, an agency should not be bound by the court's invocation of constitutional avoidance. The agency retains the ability to construe the statute in any way it determines meets Congress's (constitutional) objectives, even if such reasonable interpretation would have been foreclosed by the court's prior interpretation—or even if a court would prefer another interpretation the court believes better avoids constitutional questions.[19]

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15. Clark v. Martinez, 543 U.S. 371, 381 (2005).

16. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

17. *Id.* at 982–83.

18. *Id.* at 982 (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996)).

19. Several years before the Court issued its opinion in *Brand X*, Professors Merrill and Hickman advanced a similar argument that *Chevron* should trump modern constitutional avoidance. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 915 (2001) ("When an agency's interpretation poses an actual conflict with the Constitution, the court should displace the *Chevron* doctrine and adopt the interpretation that

This argument is exemplified by how courts have dealt with constitutional avoidance in administrative law after *Brand X*. After discussing in Part I the inconsistent role constitutional avoidance played in administrative law before *Brand X*, Part II of the Article returns to the example discussed above, which involves the same statutory provision the Supreme Court interpreted in *Clark*. Without the benefit of *Brand X*, the Fifth and Ninth Circuits held that the Supreme Court's interpretation of the statute foreclosed the Attorney General's subsequent interpretation.[20] By contrast, the Tenth Circuit, in an opinion authored by Judge Michael McConnell, reached the opposite conclusion by applying *Brand X* to allow the agency's subsequent interpretation to stand.[21] This example demonstrates how the *Brand X* doctrine of avoidance restores the proper separation of powers and allows agencies to exercise their congressionally delegated authority to interpret the statutes they administer. It also illustrates the comparative strengths of courts and agencies. Whereas courts are well equipped to decide whether a construction is actually constitutional, agencies often are in a better position to fill the holes in ambiguous statutes they administer with procedural and substantive safeguards that eliminate constitutional concerns. Moreover, because agencies may well resolve the constitutional questions through their interpretations, a *Brand X* doctrine of avoidance advances the prudential interest that motivates the avoidance canon in the first place—i.e., that courts should confront constitutional questions only when absolutely necessary.

The Article then steps back to explain why the Tenth Circuit's approach, with one major caveat, is the proper one after the Supreme Court's decision in *Brand X*. Part III examines the impact of *Brand X* on the doctrine of constitutional avoidance, as well as the separation of powers concerns that support the abandonment of modern avoidance under *Chevron*. While the Article relies primarily on traditional theories of separation of powers (in both their Article I and Article II form) to justify such abandonment, Part III also briefly explores how Dean Edward

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avoids this result. However, short of an actual conflict with the Constitution, *Chevron* instructs that courts should seek to preserve the discretion of agencies to resolve questions of policy. Thus, whatever the fate of the avoidance of questions canon in other contexts, it should be abandoned in cases that arise under the *Chevron* doctrine." (footnote omitted)).

20. Tran v. Mukasey, 515 F.3d 478, 485 (5th Cir. 2008); Thai v. Ashcroft, 366 F.3d 790, 798–99 (9th Cir. 2004).

21. Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1242 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1011 (2009). The Supreme Court may well decide to resolve this circuit conflict regarding the validity of the regulation at issue, and *Brand X* and *Clark* arguably confirm that the Tenth Circuit got it (mostly) right.

Rubin's network theory of government affects the analysis. Network theory further clarifies the separation of powers concerns at play in this context by more precisely capturing the expansive role of the modern administrative state, including the recognition that administrative agencies—not courts—"are generally the primary interpreters of statutes in the modern state."[22] Under network theory, unless otherwise authorized (which they are not), courts should limit the constitutional aspect of their "supervisory" role to preclude agency constructions that are actually unconstitutional.[23]

Part IV then explores how this *Brand X* doctrine of constitutional avoidance plays out in a number of administrative contexts, ranging from environmental protection and national labor relations to immigration and national security. The purpose of the Article is not to advocate for specific outcomes in particular areas of administrative law. To be sure, there is often a strong correlation between the invocation of constitutional avoidance and the political nature of a particular statutory scheme. But this Article is not intended to be a call for a new administration to push constitutional boundaries and essentially reverse those judicial decisions with which the administration disagrees. The Article, instead, merely recognizes that a *Brand X* approach to constitutional avoidance in administrative law preserves the proper separation of powers and that it should be the proper reconciliation of the conflicting commands of *Chevron* deference and constitutional avoidance.

I. CONSTITUTIONAL AVOIDANCE IN ADMINISTRATIVE LAW

Much confusion exists about the interplay between *Chevron* deference and constitutional avoidance. This confusion can be explained, in part, by two developments that complicated the role of avoidance in administrative law. First, the now-familiar *Chevron* two-step approach did not arrive until 1984—long after the doctrine of constitutional avoidance—yet the Court has never squarely reconciled the two seemingly conflicting commands. Second, the doctrine of constitutional avoidance has been modernized so as to avoid not just unconstitutional constructions, but even constructions that merely implicate constitutional doubts. It probably makes sense to begin with the latter.

22. EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 64 (2005).

23. *See id.* at 91–94 (proposing "authorization" and "supervision" as substitutes for the concepts of "power" and "discretion").

A. Constitutional Avoidance: Classical v. Modern Formulations

The doctrine of constitutional avoidance is a canon of statutory construction that has a "classical" and "modern" form.[24] Classical avoidance, which emerged in the 1800s, commands that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the Act."[25] In other words, this tool of statutory construction only applies if one construction is actually unconstitutional.

Developed in the 1900s, modern avoidance, however, takes the rule one step further: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter."[26] It is sufficient to invoke the modern doctrine if a construction implicates "'a serious doubt' as to its constitutionality,"[27] "raise[s] serious constitutional problems,"[28] or "raise[s] a multitude of constitutional

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24. Vermeule, *supra* note 5, at 1949. Professor Kloppenberg appears to make a similar delineation between "narrow" and "broad" constitutional avoidance. Kloppenberg, *supra* note 6, at 10–11, 90–92; *see also* Vermeule, *supra* note 5, at 1949 n.24 ("Classical and modern avoidance seem to correspond to what Kloppenberg terms the 'narrow' and 'broad' versions of the avoidance canon."). Professor Vermeule also identifies a third form of constitutional avoidance—"procedural avoidance"—which is not a canon of statutory construction and thus not directly relevant for the purposes of this Article. *See id.* at 1948 ("This is perhaps the most general and protean category of avoidance principles, but the core tenet is that courts should order the issues for adjudication . . . with an eye to obviating the need to render constitutional rulings on the merits."); *see also* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1015–24 (1994) (discussing various constitutional avoidance or "last resort" rules as articulated, *inter alia*, in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)).

25. Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) (citing for this "settled rule" United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 407 (1909); *see also* United States v. Standard Brewery, Inc., 251 U.S. 210, 220 (1920); Texas v. E. Tex. R.R. Co., 258 U.S. 204, 217 (1922); Bratton v. Chandler, 260 U.S. 110, 114 (1922); Pan. R.R. Co. v. Johnson, 264 U.S. 375, 390 (1924)). Professor Vermeule traces classical constitutional avoidance back to before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800). Vermeule, *supra* note 5, at 1948 & n.13. Others believe *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), was the starting point. *See, e.g.*, Kelley, *supra* note 4, at 837 & n.23; Schauer, *supra* note 6, at 73 n.9.

26. *Del. & Hudson Co.*, 213 U.S. at 408.

27. Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

28. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). The *DeBartolo* Court recognized an important limitation on the doctrine, in that the alternative construction the court chooses to adopt must not be "plainly contrary to the intent of Congress." *Id.* That is because a driving rationale for constitutional avoidance is the recognition that "Congress, like this Court, is bound by and swears an oath

problems."[29] The court need not determine if the interpretation at issue is actually unconstitutional.

Justice Thomas has summarized the critical difference between the classical and modern approaches:

> The modern canon of avoidance is a doctrine under which courts construe ambiguous statutes to avoid constitutional doubts, but this doctrine has its origins in a very different form of the canon. Traditionally, the avoidance canon was not a doctrine under which courts read statutes to avoid mere constitutional doubts. Instead, it commanded courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading.[30]

The "basic difference" is thus that the classical version asks whether "the statute would be unconstitutional, while the [modern version] requires only a determination that one plausible reading might be unconstitutional."[31] Both are implicated only when the statute is ambiguous, but the classical version resolves the ambiguity by choosing a particular construction that is constitutional. The modern version, by contrast, construes the ambiguity to avoid even constitutional doubts without definitively resolving whether those doubts would make the statute unconstitutional.

B. Conflicting Commands: Modern Avoidance v. Chevron

This wrinkle between the classical and modern forms of avoidance carries added significance in administrative law. In *Chevron*, the Court delineated between normal statutory interpretation and review of an agency's construction of a statute it administers. It established a two-step inquiry:

> First, always, is the question whether Congress has directly spoken to the

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to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.*

29. Clark v. Martinez, 543 U.S. 371, 380–81 (2005). The *Clark* Court may have further expanded the modern doctrine by holding that "[i]f one of [the plausible constructions] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* This "lowest common denominator approach," *id.* at 380, arguably "allows an end run around the black-letter constitutional doctrine governing facial and as-applied constitutional challenges to statutes: A litigant ordinarily cannot attack statutes as constitutionally invalid based on constitutional doubts concerning other litigants or factual circumstances." *Id.* at 396 (Thomas, J., dissenting). *But see id.* at 381–82 (majority opinion) (responding to the dissent).

30. *Id.* at 395 (Thomas, J., dissenting).

31. Vermeule, *supra* note 5, at 1949 (emphases omitted); *see also* Kelley, *supra* note 4, at 839 (noting the same).

> precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.[32]

The Court underscored that, at step two, a court "need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[33] The Court justified such deference to administrative interpretations on two main grounds.

First, "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."[34] This is a matter of institutional competence or expertise: "Filling these gaps, the [*Chevron*] Court explained, involves difficult policy choices that agencies are better equipped to make than courts."[35] Second, deference "to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[36] The *Chevron* Court explained that these two main objectives reinforce core democratic principles of political accountability:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing

32. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (footnotes omitted).

33. *Id.* at 843 n.11.

34. *Id.* at 866.

35. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 865–66).

36. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); *see also* Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2231 (1997) ("*Chevron* sends a clear message to the Legislative Branch: If you . . . decline to make a policy decision through the legislative process, we will deem your failure to so act as ceding the power to make that policy decision to the President.").

> interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[37]

When modern constitutional avoidance and *Chevron* are considered together, a court is faced with conflicting commands if it determines that a statutory provision an agency administers is ambiguous and could be read to raise serious constitutional doubts. The court must begin by either avoiding a construction that implicates the constitutional question or deferring to an agency's answer to the question. Under classical avoidance, by contrast, there is no real dilemma. The court is commanded to construe a statute to be constitutional, and an agency does not have discretion to construe a statute unconstitutionally. Thus, the agency in essence must apply classical avoidance in its interpretation; otherwise, the court should strike down the agency's interpretation as impermissible because it is actually unconstitutional.

But modern avoidance, as discussed, reaches beyond prohibiting unconstitutional constructions to precluding even potentially constitutional constructions. It is quite possible, for instance, that an agency's construction of a statute would avoid all constitutional concerns. Yet, if modern avoidance were applied before *Chevron* deference, a court may well construe away all ambiguity in the statute and thus pretermit the *Chevron* inquiry at step one. In that sense, avoidance would trump *Chevron* deference.

C. *Pre*-Brand X *Confusion: Avoidance's Role Under* Chevron

Before *Brand X* and *Clark*, it was far from clear how to reconcile the conflicting commands of constitutional avoidance and *Chevron*. And the Supreme Court oftentimes did not reach the correct result. The Court first confronted this dilemma in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*.[38] There, a union was distributing handbills that discouraged consumers from shopping at a mall because one of the mall contractors paid substandard wages and fringe benefits. The

37. *Chevron*, 467 U.S. at 865–66; *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373 (2001) ("As first conceived, the *Chevron* deference rule had its deepest roots in a conception of agencies as instruments of the President, entitled to make policy choices, within the gaps left by Congress, by virtue of his relationship to the public."); Randolph J. May, *Defining Deference Down: Independent Agencies and* Chevron *Deference*, 58 ADMIN. L. REV. 429, 447 (2006) (reviewing rationales for *Chevron* deference and concluding that "the agency expertise justification plays second fiddle to the primary political accountability rationale in *Chevron*").

38. 485 U.S. 568 (1988).

contractor filed a complaint with the National Labor Relations Board, charging that the union had engaged in unfair labor practices. The Board ultimately concluded that the handbilling activity violated labor laws because it constituted economic retaliation.[39] The Court noted that the Board's construction "would normally be entitled to [*Chevron*] deference," but it found pertinent "[a]nother rule of statutory construction"—i.e., modern constitutional avoidance.[40]

The Court found that "the Board's construction of the statute, as applied in this case, poses serious questions of the validity of [the statute] under the First Amendment."[41] The Court did not decide the constitutional question. Indeed, it noted that:

> Even if [the Board's] construction of the Act were thought to be a permissible one, we are quite sure that in light of the traditional rule followed in *Catholic Bishop*, we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [the Act].[42]

The Court concluded that "the section is open to a construction that obviates deciding whether a congressional prohibition of handbilling . . . would violate the First Amendment."[43] Based on this holding, some scholars (and courts) have read *DeBartolo* as standing for the proposition that "the avoidance canon simply trumps *Chevron*."[44]

In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*,[45] the Court again seemed to weigh in on the interaction between *Chevron* and constitutional avoidance—and again got it wrong. There, the Court found at *Chevron* step one that the statute was clear that the federal government did not have jurisdiction under the Clean Water Act to regulate isolated ponds and mudflats. It thus refused to give *Chevron* deference to the government's contrary construction. The Court went a step further, however, and stated that it would not give *Chevron* deference even if the statute were not clear. Citing *DeBartolo*, the Court explained that "[w]here

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39. *Id.* at 573. The National Labor Relations Board originally concluded that the handbilling violated another provision of the National Labor Relations Act, but the Supreme Court reversed and remanded. Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147, 155–58 (1983).

40. *DeBartolo Corp.*, 485 U.S. at 574–75 (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499–501, 504 (1979)).

41. *Id.* at 575.

42. *Id.* at 577.

43. *Id.* at 578.

44. *See* Kelley, *supra* note 4, at 871 (discussing case law and scholarship); Merrill, *supra* note 12, at 1023 & n.206; *see also* Clearing House Ass'n v. Cuomo, 510 F.3d 105, 114 (2d Cir. 2007), *aff'd in part, rev'd in part*, 129 S. Ct. 2710 (2009).

45. 531 U.S. 159 (2001).

an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[46] "This requirement," the Court explained, "stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."[47] The Court stressed that this rule applies if "significant constitutional questions [are] raised by [the government's] application of their regulations."[48] Because the government's interpretation raised such constitutional questions, the Court rejected the request for administrative deference.[49]

The Court reached a different conclusion in *Rust v. Sullivan*.[50] There, a divided 5–4 Court upheld federal regulations that prohibited projects from receiving family planning funds that provided for abortions, or even counseled patients to consider an abortion. The Court qualified modern constitutional avoidance by the principle that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion."[51] It noted that,

46. *Id.* at 172. This formulation of the modern doctrine as a clear statement rule appears to confuse the doctrine with other doctrines, such as what some have called the "elephants-in-mouseholes" doctrine where courts "have declined to afford deference to agency interpretations where an agency's proposed interpretation relies on an insufficiently definite statutory provision in order to greatly increase the agency's power." Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 20 (2010). This doctrine receives its name from the Court's opinion in *Whitman v. American Trucking Ass'ns*, in which Justice Scalia, writing for the Court, stated that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." 531 U.S. 457, 468 (2001). As Loshin and Nielson have explained, this doctrine is really a reinvention of the nondelegation doctrine to minimize what the Supreme Court perceives to be agency action in excess of congressional delegation. *See* Loshin & Nielson, *supra*, at 53. While there is some apparent overlap between these doctrines, modern constitutional avoidance sweeps much more broadly in two respects. First, it applies to all interpretations that raise constitutional questions even if there is no question that the delegation was proper. And the *American Trucking* rule seems to require an actual finding of impermissible delegation, whereas modern avoidance requires no such similar finding of unconstitutionality—only a finding of serious constitutional questions.

47. *Solid Waste Agency*, 531 U.S. at 172–73.

48. *Id.* at 174.

49. *Id.* This was a 5–4 decision with a vigorous dissent. Justice Stevens emphasized, in his dissent, that the majority's "refusal [to defer to the government's construction] is unfaithful to . . . *Chevron*"—though he did not comment on the majority's use of constitutional avoidance. *Id.* at 191 (Stevens, J., dissenting).

50. 500 U.S. 173 (1991).

51. *Id.* at 191 (quoting George Moore Ice Cream Co. v. Rose, 289 U. S. 373, 379 (1933)).

because Congress forbade federal funding for programs where abortion is a method of family planning, any regulations promulgated to implement this prohibition would raise serious constitutional questions after *Roe v. Wade*. So based on this ruling, the possibility of difficult constitutional questions is not enough to trump *Chevron* deference. Although it found that the petitioners' constitutional arguments were not "without some force," the Court found the regulations to be constitutional and thus reasonable under *Chevron* step two.[52] In his dissent, Justice Blackmun contended that the Court had sidestepped the modern avoidance canon to reach the constitutional questions.[53] Justice O'Connor filed a separate dissent, arguing that the Court should have struck down the regulations based on modern constitutional avoidance: "It is enough in this litigation to conclude that neither the language nor the history of [the statute] compels the Secretary's interpretation, and that the interpretation raises serious First Amendment concerns."[54]

It is difficult to derive a coherent, consistent rule from *DeBartolo*, *Solid Waste Agency*, and *Rust*. It is thus unsurprising that courts have struggled to apply constitutional avoidance in administrative law.[55] The Ninth Circuit's en banc opinion in *Morales-Izquierdo v. Gonzales* is illustrative.[56] There, the petitioner challenged regulations that allowed for summary reinstatement of a removal order upon unlawful reentry to the United States. The regulations were based on a statute that provided that a "prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, [and] the alien is not eligible and may not apply for any [immigration] relief."[57] The challenged regulations allowed an

52. *Id.*

53. *Id.* at 205 (Blackmun, J., dissenting) ("Whether or not one believes that these regulations are valid, it avoids reality to contend that they do not give rise to serious constitutional questions. The canon is applicable to these cases not because 'it was likely that [the regulations] . . . would be challenged on constitutional grounds,' but because the question squarely presented by the regulations—the extent to which the Government may attach an otherwise unconstitutional condition to the receipt of a public benefit—implicates a troubled area of our jurisprudence in which a court ought not entangle itself unnecessarily." (citation omitted)).

54. *Id.* at 224–25 (O'Connor, J., dissenting).

55. *See, e.g.*, Whitaker v. Thompson, 353 F.3d 947, 952 (D.C. Cir. 2004) (suggesting that modern constitutional avoidance would "require [the court] to abandon or qualify *Chevron* deference"). Looking at post-9/11 national security cases, Professor Vermeule concluded that "[s]ome cases have applied just the priority rules that the commentators recommend, [*i.e.*, that constitutional avoidance trump *Chevron*], but some have not." Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1130 (2009) (discussing Tabbaa v. Chertoff, 509 F.3d 89 (2d Cir. 2007)).

56. 486 F.3d 484 (9th Cir. 2007) (en banc).

57. 8 U.S.C. § 1231(a)(5) (2006).

immigration officer to reinstate the removal order without a hearing before an immigration judge.[58] The Ninth Circuit joined the First, Sixth, Eighth, and Eleventh Circuits in upholding the regulations as a permissible construction of the statute under *Chevron*.[59]

Unlike the challenges raised in the other circuits, the petitioner in *Morales-Izquierdo* asked the Ninth Circuit to invoke modern avoidance. He argued that "construing the statute so as to require that reinstatement hearings be held before an immigration judge would avoid constitutional problems that arise by assigning the reinstatement function to an immigration officer."[60] Judge Kozinski, writing for the en banc majority, stated that modern avoidance plays no role at *Chevron* step two:

> When Congress has explicitly or implicitly left a gap for an agency to fill, and the agency has filled it, we have no authority to re-construe the statute, even to avoid potential constitutional problems; we can only decide whether the agency's interpretation reflects a plausible reading of the statutory text.[61]

That is because at *Chevron* step two the inquiry is not whether the agency's construction is the best interpretation, only whether it is reasonable. The court then held that the regulations were constitutional and reasonable.

Judge Sidney Thomas, joined by three of his colleagues on the eleven-judge en banc panel, dissented. In addition to contending that the statute unambiguously required a hearing before an immigration judge, the dissent argued that modern constitutional avoidance would preclude the government's interpretation. The dissent conceded that constitutional avoidance may not apply at *Chevron* step two, but argued that, as a tool of statutory construction, "the avoidance canon rests on a judicial presumption that Congress always intends to steer clear of constitutional boundaries. . . . [I]t certainly pertains to the step one determination of whether Congress intended to preclude the agency's interpretation."[62] The dissent cited *DeBartolo* and *Solid Waste Agency* as cases decided at step one based on constitutional avoidance.[63]

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58. 8 C.F.R. § 241.8(a) (2011).

59. *Morales-Izquierdo*, 486 F.3d at 489, 495. The Ninth Circuit panel had ruled that the regulation was ultra vires because "[t]he plain statutory language, supported by the structure of the legislation, provides that an immigration judge must conduct all proceedings for deciding the inadmissibility or deportability of an alien." Morales-Izquierdo v. Ashcroft, 388 F.3d 1299, 1305 (9th Cir. 2004), *reh'g en banc granted*, 423 F.3d 1118 (9th Cir. 2005). The panel thus had no occasion to invoke the doctrine of constitutional avoidance.

60. *Morales-Izquierdo*, 486 F.3d at 492.

61. *Id.* at 493.

62. *Id.* at 504 (Thomas, J., dissenting). Judge Thomas also authored the vacated panel opinion. *Morales-Izquierdo*, 388 F.3d at 1301.

63. *Morales-Izquierdo*, 486 F.3d at 504 (citing Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001); Edward J. DeBartolo Corp. v.

While theoretically plausible, the dissent's reading of *DeBartolo* and *Solid Waste Agency* arguably does not square with the Court's actual holdings in those cases. Nor, for that matter, does the majority's reading. To be sure, the Court was unambiguously clear in both cases that the agency's construction of the statute was impermissible because it did not avoid serious constitutional questions. It does not necessarily follow, however, that constitutional avoidance trumps *Chevron* at step one. Contrary to the dissent's characterization, in neither case did the Court invoke constitutional avoidance to expressly declare that the statute is unambiguous at *Chevron* step one. Instead, the *Solid Waste Agency* Court seemed to suggest that modern avoidance applies at step two. The Court held that the government's interpretation—due to the constitutional questions it raised—was unreasonable absent "a clear indication that Congress intended that result."[64] The *DeBartolo* Court also seemed to apply modern avoidance at step two, only invoking the doctrine if the agency's "otherwise acceptable construction of [the] statute would raise serious constitutional problems."[65] Either formulation would thus appear to conflict with the Ninth Circuit majority's view that avoidance plays no role at *Chevron* step two (in addition to the dissent's view that the doctrine applies at step one).[66] But even that reading is unclear.

In sum, before *Brand X* the Supreme Court had applied (incorrectly) modern avoidance in administrative law, though it never really explained why.[67] Contrary to the dissent in *Morales-Izquierdo* and the views of several

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Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

64. *Solid Waste Agency*, 531 U.S. at 172.

65. *DeBartolo Corp.*, 485 U.S. at 575; *see also* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 387 (1998) (Rehnquist, C.J., concurring) ("We have held that when an interpretation raises such constitutional concerns, the Board's interpretation of the Act is not entitled to deference."); Miller v. Johnson, 515 U.S. 900, 923 (1995) ("[W]e have rejected agency interpretations to which we would otherwise defer where they raise constitutional questions. When the Justice Department's interpretation of the [Voting Rights] Act compels race-based districting, it by definition raises a serious constitutional question and should not receive deference." (citations omitted)).

66. The Ninth Circuit's en banc opinion could also be read as holding that constitutional avoidance plays no role at *Chevron* step two in this particular case as the regulations do not raise constitutional concerns. *See Morales-Izquierdo*, 486 F.3d at 495–98 (rejecting the constitutional challenges to the regulations).

67. *See, e.g.*, Elliott Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 31 (2006) ("The [*DeBartolo*] Court provides no further justification in brushing aside *Chevron* other than its statement that the constitutional avoidance canon is a 'cardinal principle' that has been applied since the early days of the Court."); Kelley, *supra* note 4, at 871 ("Unfortunately, however, the opinion in *Edward J. DeBartolo Corp.* contains *no* explanation for why the Court reached that conclusion."); Merrill, *supra* note 12, at 1023 ("*Chevron* itself supplies no rationale for such a holding.").

scholars, the Court arguably did not hold that modern constitutional avoidance trumps *Chevron* deference at step one by construing away all ambiguity in the statute.[68] Instead, to the extent a coherent rule can be gleaned, the Court seemed to hold that an agency's otherwise reasonable interpretation may be impermissible if that interpretation raises serious constitutional concerns (thus contradicting the Ninth Circuit majority's rule in *Morales-Izquierdo*).

II. *BRAND X* AVOIDANCE EXEMPLIFIED

The effect of the Supreme Court's decision in *Brand X* on the interplay between modern avoidance and *Chevron* deference is best understood with a concrete example—this one from the immigration context. This example also underscores the separation of powers concerns at play when modern avoidance is applied in the review of administrative interpretations of law, as well as the comparative institutional strengths of courts and agencies in addressing constitutional problems in ambiguous statutes that agencies administer.

A. Competing Judicial and Administrative Interpretations

Under the Immigration and Nationality Act, the government must generally remove from the country a noncitizen who has been ordered removed within ninety days of the issuance of a final removal order; otherwise the noncitizen must be released back into the United States.[69] Congress, however, provided that noncitizens "may be detained beyond the

68. The dissent in *Morales-Izquierdo* may well have confused classical and modern constitutional avoidance. The former, where a court rules that a particular construction would violate the Constitution, would arguably eliminate a particular construction of a statute at *Chevron* step one. Of course, a court may still consider this a step two issue and hold that the agency's interpretation is impermissible or unreasonable because it is unconstitutional. It is quite another matter, as discussed in the text, to hold that an agency lacks discretion to adopt a construction, or that an agency's interpretation is unreasonable, because its interpretation raises (and then adequately answers) constitutional questions.

Notwithstanding, a panel of the Ninth Circuit has since adopted the dissent's view and held that constitutional avoidance applies at *Chevron* step one. *See* Diouf v. Napolitano, 634 F.3d 1081, 1090 n.11 (9th Cir. 2011) ("We have held that the constitutional avoidance canon plays no role during step two in the *Chevron*. But the canon applies at *Chevron* step one, because it is 'a means of giving effect to congressional intent.'" (quoting Clark v. Martinez, 543 U.S. 371, 382 (2005))). As discussed, the Ninth Circuit in *Diouf* would have been well served to have distinguished between modern and classical constitutional avoidance and to have held that classical constitutional avoidance applies as *Chevron* step two (i.e., that an agency cannot choose an unconstitutional interpretation of a statute), as the panel appeared to find the regulation to be unconstitutional. *See id.* at 1091.

69. 8 U.S.C. § 1231(a)(1)(A) (2006).

[ninety-day] removal period" if they fall within one of three categories: (1) those ordered removed who are inadmissible; (2) those ordered removed as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy; and (3) those ordered removed who the Attorney General determines to be a risk to the community or a flight risk.[70] Congress placed no explicit limitation on the length of this continued detention.

In *Zadvydas v. Davis*,[71] the Supreme Court considered whether noncitizens held pursuant to the second category could be held indefinitely (and it did so in the absence of an agency's interpretation of that statutory provision). Because no country would accept them, the government continued to detain these noncitizens for years beyond the ninety-day removal period. The government argued that the language "may be detained beyond the removal period" authorized indefinite detention.[72] The Court, however, reasoned that indefinite detention, especially due to the lack of any procedural protections, would present serious constitutional problems under the Due Process Clause.[73] Applying the modern doctrine of constitutional avoidance, the Court held that the statute was ambiguous and construed it to mean that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."[74] The Court concluded that six months beyond the ninety-day removal period was a presumptively reasonable detention period in which to effectuate removal.[75]

Four years later in *Clark v. Martinez*,[76] the Court was asked again to interpret the continued detention statute—this time with respect to the first category of noncitizens who had never been legally admitted into the country. (Again, no formal agency interpretation was at issue.) The government argued that, unlike indefinite detention of admitted yet removable noncitizens—the second category addressed in *Zadvydas*—indefinite detention of inadmissible noncitizens does not raise serious constitutional concerns because inadmissible noncitizens do not have the same rights and privileges under the Constitution. It relied on the *Zadvydas* Court's statement that any "[a]liens who have not yet gained initial admission to this country would present a very different question."[77] The

70. *Id.* § 1231(a)(6).
71. 533 U.S. 678 (2001).
72. *Id.* at 689.
73. *Id.* at 690.
74. *Id.* at 699.
75. *Id.* at 701.
76. 543 U.S. 371 (2005).
77. *Zadvydas*, 533 U.S. at 682.

Court disagreed, holding that "[t]he operative language of § 1231(a)(6), 'may be detained beyond the removal period,' applies without differentiation to all three categories of aliens that are its subject," and that "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one."[78]

Following *Zadvydas* but before *Clark*, the Attorney General promulgated, through notice-and-comment rulemaking, a set of comprehensive regulations intended to narrow the scope of his detention authority and bring it in conformity with the Court's ruling in *Zadvydas*.[79] As to most noncitizens—including those who fall within the *Clark* category one (inadmissible noncitizens) and the *Zadvydas* category two (certain removable noncitizens)—the regulations provide for release within six months if there is no likelihood of removal.[80] As to a subset of those noncitizens in the third category of § 1231(a)(6) ("risk to the community") who pose heightened risks to the public or the security of the United States, the regulations establish procedures for continued detention beyond the six-month presumptively reasonable period. With respect to noncitizens who are "determined to be specially dangerous," the regulations provide:

> Subject to the review procedures provided in this section, the Service shall continue to detain an alien if the release of the alien would pose a special danger to the public, because:
>
> (i) The alien has previously committed one or more crimes of violence as defined in 18 U.S.C. 16;
>
> (ii) Due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and
>
> (iii) No conditions of release can reasonably be expected to ensure the safety of the public.[81]

The review procedures set forth in the regulations include the following: If the government determines in writing—after arranging for a report by a physician based on a full medical and psychiatric exam[82]—that these conditions apply, then an immigration judge holds a preliminary hearing to determine whether there are grounds for further proceedings. The noncitizen is given a list of free legal service providers and provided an interpreter, he has the right to examine evidence, and he may cross-

78. *Clark*, 543 U.S. at 378.
79. *See* 8 C.F.R. §§ 241.13–.14 (2011).
80. *Id.* § 241.13(g)(1).
81. *Id.* § 241.14(f)(1).
82. *Id.* § 241.14(f)(3).

examine government witnesses and physicians who issued any report.[83] If the government meets its burden, the immigration judge then holds a merits hearing where the government must prove by clear and convincing evidence that the noncitizen "should remain in custody because the alien's release would pose a special danger to the public" based on the above three conditions.[84] The noncitizen has a right to appeal an adverse decision[85] and may seek review of his custody status based on changed circumstances every six months.[86] The government must provide an ongoing, periodic review of the noncitizen's continued detention.[87]

B. Comparative Strengths of Courts and Agencies

Before turning to how courts have attempted to address these competing interpretations of the continued-detention statute, it is worth pausing to consider the stark difference between the judicial and administrative interpretations of the statute. The Court's interpretation is a blunt, one-size-fits-all approach that draws a bright-line rule that lower courts (and other government actors) can apply easily and consistently. The Court makes no attempt to fill in the holes in the statute with additional procedures, substantive criteria, or other safeguards to address the constitutional concerns. Indeed, the Court appears to suggest that such efforts "would be to invent a statute rather than interpret one."[88]

This observation is not meant as a criticism, as courts are not (and should not be) in the business of construing ambiguous statutes by interjecting policies and provisions not articulated by a politically accountable body. Not only would such judicial policymaking intrude on democratic process and separation of powers, but courts also lack the institutional competence to engage in such policymaking efforts in the first place. Courts are much better at deciding whether a particular statutory or regulatory scheme is constitutional than they are at figuring out how to design a statutory or regulatory scheme so as to avoid constitutional problems while still achieving stated policy objectives.

The Attorney General's interpretation, by contrast, fills in the holes in the statute with procedural safeguards and substantive criteria aimed at eliminating the constitutional concerns while also advancing the policy objectives set forth in the statute. Unlike courts, agencies are charged by

83. *Id.* § 241.14(g).
84. *Id.* § 241.14(i)(1) (referring to the three criteria found in 8 C.F.R. § 241.14(f)(1)).
85. *Id.* § 241.14(i)(4).
86. *Id.* § 241.14(k)(3).
87. *Id.* § 241.14(k)(1) (citing 8 C.F.R. § 241.14(f)(1)).
88. Clark v. Martinez, 543 U.S. 371, 378 (2005).

Congress to fill in the holes (and by the Executive to execute the law) in precisely this manner. And they have several tools to assist them in this policymaking function. For instance, as opposed to courts, agencies employ experts in the relevant regulatory context who are familiar with the policy objectives and may have encountered similar deficiencies in procedures or substantive criteria in related contexts.[89] Agencies also have access to bureaucrats in other administrative contexts with expertise in designing regulatory schemes that provide sufficient and efficient procedures.

Moreover, in certain contexts such as this one, agencies benefit from direct feedback from the public and nongovernmental experts through notice-and-comment rulemaking. Such rulemaking is the process by which a proposed regulation is published in the *Federal Register* and is open to comment by the general public. The agency must respond to significant objections to the agency's proposed regulation, and the adequacy of its response is subject to judicial review.[90] Through this notice-and-comment rulemaking process, the agency can benefit from nongovernmental experts in the field. By considering improvements suggested by these experts and the general public, the regulations agencies ultimately adopt are likely to be more effective in providing adequate procedures, realizing the policy objectives, and avoiding unintended consequences.[91] Indeed, Congress has imposed notice-and-comment rulemaking, as the Sixth Circuit explained, primarily "to get public input so as to get the wisest rules."[92] Additionally, such rulemaking allows the President and Congress to influence the regulations that agencies adopt—thus increasing political accountability.[93]

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89. *See, e.g.*, 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.9, at 377 (4th ed. 2002) ("An agency with expertise in a particular area of regulation has an enormous advantage over a reviewing court in making this complicated judgment."); Bamberger, *supra* note 14, at 96 (explaining that "the shortcomings of judicial capacity, which [normative] canons are, at least in part, intended to overcome—inferior capacity for fact-finding and policymaking on one hand, and a hesitance to strike down, on direct constitutional grounds, legislation enacted through democratic processes, on the other—are the very same competencies at which agencies may excel"); Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 247 (1987) (noting that bureaucrats become experts in their own policy areas).

90. *See, e.g.*, M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1390 (2004); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 549–50 (2000).

91. *See, e.g.*, Pierce, *supra* note 90, at 550 ("[Notice-and-comment rulemaking] enhances the quality of rules by allowing the agency to obtain a better understanding of a proposed rule's potential effects in various circumstances and by allowing the agency to consider alternative rules that might be more effective in furthering the agency's goals or that might have fewer unintended adverse effects.").

92. Dismas Charities, Inc. v. DOJ, 401 F.3d 666, 680 (6th Cir. 2005).

93. *See* Pierce, *supra* note 90, at 550. Indeed, the President, through the Office of

In sum, this example of competing judicial and administrative interpretations underscores the comparative institutional strengths of courts and agencies. To be sure, courts have expertise to decide whether a statutory or regulatory scheme is actually constitutional. But agencies, as a practical matter, are often better equipped to fill the holes in the statutes they administer with sufficient procedural and substantive safeguards to avoid constitutional questions in the first place. This is particularly true where, as here, Congress has required the agency to engage in notice-and-comment rulemaking. This practical consideration of comparative expertise provides further support for discontinuing the use of modern constitutional avoidance in the review of administrative interpretations of law.

C. Judicial Attempts to Address Competing Interpretations

Despite the fact that the Attorney General's interpretation arguably resolves the constitutional questions the *Zadvydas* Court identified, courts have not reached the same conclusion about whether the judicial or administrative interpretation should control.

The Ninth Circuit was the first federal court of appeals to consider the constitutionality of these regulations. In *Thai v. Ashcroft*, a three-judge panel struck down the regulations as foreclosed by *Zadvydas*.[94] The panel held that the agency was constrained by the *Zadvydas* Court's imposition of a six-month limitation on how long the government could hold a noncitizen subject to removal. In other words, the Supreme Court in *Zadvydas* construed away all ambiguity in the statute such that the agency no longer had discretion to provide an alternative interpretation. This approach parallels the traditional application of modern avoidance in the review of administrative interpretations of law, in that modern avoidance was arguably applied to construe away the ambiguity or otherwise override the administrative interpretation.

Judge Kozinski, joined by four other judges, dissented from the denial of rehearing en banc.[95] The dissent noted that *Zadvydas* only dealt with nondangerous removable noncitizens covered by the second category of the statute, not especially dangerous removable noncitizens covered by the third category. Moreover, "The [Attorney General's] regulations are

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Information and Regulatory Affairs, even requires further executive review and consultation with interested parties of certain substantial agency rulemaking. *See generally* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003).

94. 366 F.3d 790 (9th Cir. 2004).

95. Thai v. Ashcroft, 389 F.3d 967 (9th Cir. 2004) (en banc) (Kozinski, J., dissenting).

tailored to allay the Supreme Court's constitutional doubts"[96]: only a narrow subset of removable noncitizens—those mentally ill, violent criminal noncitizens who are "likely to engage in acts of violence in the future" and for whom "[n]o conditions of release can reasonably be expected to ensure the safety of the public"[97]—are subject to continued detention. In addition, the regulations provide ample procedural protections, including required mental health evaluations, a preliminary and then plenary hearing before an immigration judge, rights to examine witnesses and evidence, and further appellate review and periodic agency re-review. Moreover, the government bears the burden to prove, by clear and convincing evidence, that the noncitizen merits continued detention.[98] The dissent noted that "[t]he Court said nothing about how the statute is to be construed in situations where the alien is given the procedural protections it found missing in *Zadvydas*."[99]

Judge Kozinski's argument foreshadowed the reasoning of the Supreme Court's subsequent decision in *Brand X*:

> There can be no doubt that, had the regulations been promulgated *before Zadvydas*, they would have been upheld. In adopting the regulations, the [Attorney General] drew upon a broad grant of regulatory authority, and the statute itself—as written by Congress—clearly authorizes detention of aliens beyond six months. Because the regulations obviate the constitutional doubts expressed in *Zadvydas*, the reasons given by the Court in that opinion would not have provided a basis for striking down the regulations. There is no

96. *Id.* at 970. Indeed, when developing these regulations, the Attorney General explained that section 241.14 was created "to justify continued detention of a particular alien because of special circumstances, of the sort discussed in the Supreme Court's decision in *Zadvydas*, even though the alien's removal is not significantly likely in the reasonably foreseeable future." Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,968–69 (Nov. 14, 2001) (codified at 8 C.F.R. pt. 241 (2010)); *see also* Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001) ("[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections. . . . In cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger." (citing Kansas v. Hendricks, 521 U.S. 346 (1997))). The Ninth Circuit panel rejected the dissent's reliance on this language from *Zadvydas*:

> The statement in *Zadvydas* that noncriminal detention by the Government is permissible only in narrow nonpunitive circumstances was intended to illustrate what the Government is generally *prohibited* from doing, and what it may in some circumstances be permitted to do. It did not state what the Government is authorized to do under § 1231(a)(6).

Thai, 366 F.3d at 795.

97. 8 C.F.R. § 241.14(f) (2011).

98. *Thai*, 389 F.3d at 970 (Kozinski, J., dissenting).

99. *Id.*

> legitimate reason the result should be different just because the [Attorney General] promulgated the regulations after *Zadvydas*.[100]

To hold otherwise, as the panel did, Judge Kozinski argued:

> [I]mplicates important separation of powers principles. . . . Given the plenary authority of the political branches in the field of immigration, the judiciary must be particularly careful not to cut off the [Attorney General's] earnest effort to fulfill the function entrusted to him by Congress within constitutional limits. The panel's opinion takes the opposite approach, perversely leaving the [Attorney General], when acting pursuant to authority expressly granted to him by Congress, with fewer powers to detain undocumented aliens who are mentally disturbed and dangerous than the states have in detaining dangerous U.S. citizens.[101]

Four years later, in *Tran v. Mukasey*, the Fifth Circuit joined the Ninth Circuit in striking down the continued detention regulations.[102] Unlike the Ninth Circuit in *Thai v. Ashcroft*, the Fifth Circuit decided this case after the Supreme Court issued its *Brand X* decision. The government, however, did not rely on or even cite *Brand X* and instead argued that the court should adopt the reasoning in Judge Kozinski's *Thai* dissent.[103] The Fifth Circuit rejected that argument as foreclosed by *Zadvydas* and *Clark* because those two Supreme Court precedents had construed away any ambiguity in the statute.[104]

Later that year, in *Hernandez-Carrera v. Carlson*, the Tenth Circuit reached the opposite conclusion by applying *Brand X* to allow the agency's continued detention regulations to stand.[105] This case involved two petitioners who had sought habeas relief for their continued (and

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100. *Id.*; *see also* Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1248 (10th Cir. 2008) ("Judge Kozinski, dissenting from denial of rehearing *en banc* in *Thai*, anticipated *Brand X* to reach a conclusion similar to that which we reach today."), *cert. denied*, 130 S. Ct. 1011 (2009).

101. *Thai*, 389 F.3d at 971 (Kozinski, J., dissenting) (citing Boutilier v. INS, 387 U.S. 118, 123 (1967)).

102. 515 F.3d 478, 485 (5th Cir. 2008).

103. *Id.* at 483.

104. *Id.* at 484 ("The Supreme Court has twice held that § 1231(a)(6) does not authorize indefinite detention for any class of aliens covered by the statute. We are bound by the statutory construction put forward in *Zadvydas* and *Clark*. Accordingly, 8 C.F.R. § 241.14, which was enacted under the authority of § 1231(a)(6), cannot authorize Tran's indefinite detention." (citing Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994)). As discussed more fully below, the Fifth Circuit's conclusion is in tension with the *Brand X* Court's holding that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

105. *Hernandez-Carrera*, 547 F.3d at 1242.

apparently indefinite) detention pending removal. Likely because of the petitioners' criminal history, the government had been unable to find a country that was willing to accept them. One petitioner, for instance, had been convicted of sexually assaulting a seven-year-old boy and had admitted to involvement in several hundred pedophilic contacts with children in Cuba and in the United States. While in custody, he was diagnosed with pedophilia. The other petitioner had been diagnosed with schizophrenia and had been convicted of battery and indecent exposure before being detained by the Immigration and Naturalization Service (INS). While in INS custody, the petitioners were examined by mental health professionals and deemed especially dangerous. After being provided the procedural protections set forth in the continued detention regulations, an immigration judge concluded that there were no reasonable conditions of release that could reasonably be expected to ensure the safety of the public and thus ordered continued detention for both petitioners.[106]

The district court, like the Fifth and Ninth Circuits, found the continued detention regulations to be ultra vires and granted the petitioners' writs of habeas corpus.[107] The Tenth Circuit reversed. Writing for the panel, Judge McConnell explained that the court had to answer two questions:

> [I]n order to determine whether the Attorney General's construction of 8 U.S.C. § 1231(a)(6) warrants deference, notwithstanding the Supreme Court's contrary construction of the statute in *Zadvydas* and [*Clark v.*] *Martinez*, we must ask: 1) whether "the statute is silent or ambiguous" as to the Attorney General's authority to detain certain categories of aliens beyond the ninety day removal period; and 2) whether the agency's construction of the statute represents a "permissible reading of the statute."[108]

After concluding that the statute was ambiguous, the court held that the agency's construction was a permissible reading of the statute for three reasons.

First, the court found the agency's construction permissible because "the substantive limitations built into the Attorney General's power to detain aliens beyond the removal period, as well as the procedural protections provided in such cases, are sufficient to satisfy due process," and thus "the agency's construction of § 1231(a)(6) no longer raises serious constitutional

106. *See id.* at 1242–44 (providing background on the two petitioners).

107. Hernandez-Carrera v. Carlson, 546 F. Supp. 2d 1185, 1189 (D. Kan. 2008) ("The court finds no meaningful way to distinguish the facts and circumstances of the two remaining petitioners in the present case from the petitioners in *Tuan Thai* and *Tran*, and thus adopts and incorporates the reasoning of those courts and reaches the same conclusion."), *vacated and remanded*, 547 F.3d 1237 (10th Cir. 2008).

108. *Hernandez-Carrera*, 547 F.3d at 1244–45.

doubts."[109] As Judge Kozinski had previously observed, the court found that the procedural protections established by the regulations avoid all of the constitutional concerns identified in *Zadvydas* (and *Clark*).[110]

Second, the Tenth Circuit rejected the petitioners' argument that "the Supreme Court's construction of § 1231(a)(6) in *Zadvydas* and *Martinez* forecloses any subsequent, contrary interpretation by the Attorney General."[111] The court explained that the Fifth and Ninth Circuits' contrary conclusions could not be squared with *Brand X*, which reaffirmed the holding "in *Chevron* that 'ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.'"[112] The court further explained that "[j]udicial deference to administrative interpretations in these cases is not a policy choice, but rather a means of giving effect to congressional intent."[113] Accordingly, under *Brand X* it did not matter that the judicial interpretation preceded the agency's interpretation; to hold otherwise "would be ignoring Congress' choice to empower an agency, rather than the courts, to resolve this kind of statutory ambiguity."[114] Moreover, the court rejected the petitioners' argument, perhaps first articulated by Justice Stevens in his concurring opinion in *Brand X*, that the *Brand X* rule "would not necessarily be applicable to a decision by [the Supreme Court] that would presumably remove any pre-existing ambiguity."[115] The Tenth

109. *Id.* at 1251.

110. *Id.* at 1253; *see id.* at 1253–56 (discussing at length the adequacy of the procedural protections and otherwise rejecting petitioners' due process claims).

111. *Id.* at 1246.

112. *Id.* (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005)).

113. *Id.*

114. *Id.*

115. *Id.* at 1247 (alteration in original) (quoting *Brand X.*, 545 U.S. at 1003 (Stevens, J., concurring)). As the Tenth Circuit noted, Justice Stevens may have been referring to a ruling that a statute was unambiguous. *Id.* At least one commentator, as the court also noted, has argued that Justice Stevens was reserving a *Chevron* veto power for the Supreme Court. *See id.*; Kathryn A. Watts, *Adapting to Administrative Law's* Erie *Doctrine*, 101 NW. U. L. REV. 997, 1000 n.19 (2007) ("[O]ne Justice (Stevens) took the view that agencies should be able to trump lower court interpretations but not necessarily Supreme Court interpretations."). Indeed, a student note commenting on the Tenth Circuit's opinion argues that the relevant Supreme Court precedent had foreclosed the Tenth Circuit's holding and proposes a three-factor test for determining when the *Brand X* rule should be applied to Supreme Court precedent. *See* Brandon L. Phillips, Note, *Questioning the Supremacy of the Supreme Court:* Hernandez-Carrera v. Carlson *and the Tenth Circuit's Justification for Indefinite Detention under the* Brand X *Framework*, 96 IOWA L. REV. 1099, 1121–23 (2011) ("(1) whether the statute was intended to limit agency action; (2) whether the statute inherently involves, or could lead to, significant constitutional issues; and (3) whether the judicial interpretation was intended to foreclose alternative agency interpretations.").

Circuit held that *Brand X* made no such exception and that such an exception would be contrary to the administrative law principles articulated in *Chevron* and *Brand X*.

Third, and most relevant for the purposes of this Article, the Tenth Circuit "address[ed] whether, and in what manner, an agency's interpretive discretion is constrained by the canon of constitutional avoidance."[116] The petitioners had argued that constitutional avoidance "trumps" *Chevron*, whereas the government had argued that constitutional avoidance never precludes an agency's interpretation of a statute when *Chevron* deference is otherwise appropriate. The court held that "the answer is in between"[117]: constitutional avoidance does not trump an agency's interpretation of an ambiguous statute it administers if the interpretation is reasonable and avoids serious constitutional doubts. In reaching this conclusion, the court explained that "[i]t is well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due."[118] After reviewing the relevant Supreme Court precedent, the Tenth Circuit concluded:

> [E]ven after a court has construed a statute to avoid constitutional doubts, an agency remains free to interpret the same statute in a different manner so long as its subsequent interpretation is reasonable and avoids serious constitutional questions. A court's prior judicial construction of a statute, applying the avoidance canon, precludes an alternative agency construction only when no alternative, reasonable construction would avoid constitutional doubts. In that case the only "permissible" construction is the reading which does not provoke a serious constitutional question. In the ordinary case, however, courts should review a new agency interpretation afresh to determine whether the agency's reading sufficiently avoids raising constitutional doubts, such that it ought to be entitled to deference.[119]

Because, as discussed above, the Tenth Circuit concluded that the continued detention regulations avoided all constitutional issues, it upheld

116. *Hernandez-Carrera*, 547 F.3d at 1249.

117. *Id.* This approach appears analogous to the approach the Court of Appeals for the D.C. Circuit had previously adopted: "This canon of constitutional avoidance trumps *Chevron* deference, and we will not submit to an agency's interpretation of a statute if it 'presents serious constitutional difficulties[.]' But we do not abandon *Chevron* deference at the mere mention of a possible constitutional problem; the argument must be serious." Nat'l Mining Ass'n v. Kempthorne, 512 F.3d 702, 711 (D.C. Cir. 2008) (citations omitted).

118. *Hernandez-Carrera*, 547 F.3d at 1249; *see also id.* at 1249–50 (citing Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 577 (1988)).

119. *Id.* at 1251.

the regulations and thus reversed the habeas relief granted by the district court.

Despite the fact that the Tenth Circuit's decision in *Hernandez-Carrera* created a 2–1 circuit split,[120] the Supreme Court denied further review.[121] The denial of certiorari review is not too surprising as the circuit split was shallow and arguably could have resolved itself, as the Tenth Circuit posited,[122] because neither the Fifth nor the Ninth Circuit considered *Brand X*. Indeed, the Ninth Circuit—with respect to a different immigration statute—appears to have recently adopted the same rule regarding constitutional avoidance.[123] The Tenth Circuit has also reaffirmed this rule in a different context: "Even when a Supreme Court decision conflicts with an agency's subsequent decision over the meaning of the same statute, we must still defer to the agency's decision, so long as it is reasonable and constitutional."[124] To date, no other court of appeals has addressed the continued-detention statute.[125]

While the Tenth Circuit correctly recognized that constitutional avoidance does not always trump *Chevron* deference, Judge McConnell did not go far enough. As discussed in Part III, the court should have held that avoidance plays no role under *Chevron* unless the court determines that the agency's interpretation is not constitutional.

120. *See* Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 499 n.73 (2010) ("A circuit split currently exists on the question of whether the government's new regulation qualifies for *Chevron* deference.").

121. Hernandez-Carrera v. United States, 130 S. Ct. 1011 (2009).

122. *Hernandez-Carrera*, 547 F.3d at 1248 ("We are reassured in disagreeing with the Fifth and Ninth Circuit by the fact that neither court considered the Supreme Court's *Brand X* decision."), *cert. denied*, 130 S. Ct. 1011 (2009).

123. *See* Diouf v. Napolitano, 634 F.3d 1081, 1090 (9th Cir. 2011) ("We may not defer to [Department of Homeland Security] regulations interpreting § 1231(a)(6), however, if they raise grave constitutional doubts.").

124. Olivan-Duenas v. Holder, 416 F. App'x 678, 680 n.1 (10th Cir. 2011) (emphasis omitted) (citing *Hernandez-Carrera*, 547 F.3d at 1242).

125. One district court has adopted the Tenth Circuit's reasoning. *See* Marquez-Coromina v. Hollingsworth, 692 F. Supp. 2d 565, 574 (D. Md. 2010) ("The court finds the reasoning of *Hernandez-Carrera* persuasive and will apply it to the near-identical facts of this case. Accordingly, the court finds that 8 C.F.R. § 241.14(f)(1) is a reasonable interpretation of 8 U.S.C. § 1231(a)(6) entitled to *Chevron* deference.").

III. *BRAND X* PRINCIPLES OF ADMINISTRATIVE LAW

Determining the role modern constitutional avoidance should play in the review of administrative interpretations of law is, like the *Chevron* rule itself, a two-step inquiry.

First, Part III.A explores whether modern avoidance should apply at *Chevron* step one—i.e., whether a court should invoke modern avoidance to construe away an ambiguity in the statute and thus not defer to the agency's interpretation (even if the agency's interpretation is actually constitutional). While, as discussed above, the Supreme Court's decisions on this point are unclear, many lower courts and scholars have concluded that modern avoidance trumps *Chevron* deference at step one. Part III.A explains how the Court's reasoning in *Brand X* and its progeny have made clear that modern avoidance should play no role at *Chevron* step one—a conclusion that Judge McConnell and Professor Kenneth Bamberger have similarly reached in the wake of *Brand X*.

Second, Part III.B explores the more difficult question—i.e., whether modern avoidance should apply at *Chevron* step two as a reasonableness check on agency action. In contrast to the conclusion reached by Judge McConnell and Professor Bamberger, this Article concludes that modern avoidance should play no role at *Chevron* step two. Such use of modern avoidance would do serious violence to the separation of powers by permitting a court's tentative constitutional determination to override a co-equal branch's conclusion that an otherwise permissible interpretation of an ambiguous statute comports with the Constitution. Part III.B explores both the Article I and the Article II aspects of this separation of powers concern. Part III.C then reframes the separation of power considerations through the lens of Dean Rubin's network theory, which further clarifies why modern avoidance should play no role in the review of administrative interpretations of law.

A. Clark, Brand X, *and Its Progeny: No Avoidance at* Chevron *Step One*

The October Term of 2004 brought some clarity to the role of modern avoidance in administrative law. First, in *Clark v. Martinez*, the Court addressed the doctrine of modern constitutional avoidance.[126] As discussed above, *Clark* dealt with the same continued-detention statute the Court had interpreted three years earlier in *Zadvydas*.[127] (In neither case was the Court considering an agency's interpretation that was owed *Chevron* deference.) There, the Court invoked modern avoidance to limit the government's

126. 543 U.S. 371 (2005).

127. Zadvydas v. Davis, 533 U.S. 678 (2001).

detention powers over removable noncitizens[128] to the time period "reasonably necessary" to remove the noncitizens from the country.[129] The government had been detaining certain noncitizens indefinitely, even when it knew removal was not reasonably foreseeable because no country was willing to accept the noncitizens. The *Zadvydas* Court established a six-month presumptively reasonable detention period after which the noncitizen would have to be released back into the United States if there was "no significant likelihood of removal in the reasonably foreseeable future."[130]

Clark presented the same question but with respect to inadmissible noncitizens. The *Zadvydas* Court had noted that, because inadmissible noncitizens enjoy less constitutional protections than admitted noncitizens, those "who have not yet gained initial admission to this country would present a very different question."[131] Notwithstanding these differences, the Court applied the same limitations on both groups because "[t]he operative language of [8 U.S.C.] §1231(a)(6), 'may be detained beyond the removal period,' applies without differentiation to all three categories of aliens that are its subject."[132] In so holding, the Court clarified that the modern doctrine of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."[133] It is not "a method of adjudicating constitutional questions by other means"; it is "a means of giving effect to congressional intent, not of subverting it."[134] In sum, "The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means* of *choosing between*

128. *See* 8 U.S.C. § 1231(a)(6) (2006) ("An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the [ninety-day] removal period . . . .").

129. *Zadvydas*, 533 U.S. at 689, 699.

130. *Id.* at 701.

131. *Id.* at 682.

132. Clark v. Martinez, 543 U.S. 371, 378 (2005). This statutory scheme is discussed in more detail in Part I, *infra*.

133. *Clark*, 543 U.S. at 381–82 (citing Rust v. Sullivan, 500 U.S. 173, 191 (1991); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

134. *Id.* at 381–82 (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 502 (1979); Vermeule, *supra* note 5, at 1949).

them."[135]

Later that Term, in *Brand X*, the Court reaffirmed the general *Chevron* rule: "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."[136] That is because "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in a reasonable fashion."[137] The *Brand X* Court took this principle one step further. The Ninth Circuit below had refused to accord *Chevron* deference because it had already construed the same provision of the Communications Act in a conflicting manner. It thus held that the administrative interpretation offered by the Federal Communications Commission (FCC) was foreclosed by that prior precedent.[138] The Supreme Court reversed. It held that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[139]

In other words, once the court has identified such an ambiguity, there is a "presumption" that Congress "desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows"—regardless of any prior judicial interpretation.[140] Accordingly, under *Chevron*, an administrative interpretation trumps a judicial one even if the judicial one came first:

> Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different

135. *Id.* at 385. The *Clark* Court divided 5–4, with Justice Thomas arguing in dissent, *inter alia*, that the majority had distorted the modern constitutional avoidance doctrine by adopting a "lowest common denominator" approach—i.e., asking whether an interpretation would raise constitutional doubts for third parties not before the court (instead of just focusing on petitioners). *Compare id.* at 392–401 (Thomas, J., dissenting), *with id.* at 380–83 (majority opinion). *See also supra* note 29 (discussing this further extension of modern constitutional avoidance).

136. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 & n.11 (1984)).

137. *Id.*

138. *Id.* at 982.

139. *Id.* at 982–83.

140. *Id.* at 982 (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996)).

> construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.[141]

Justice Scalia dissented, predicting that the "wonderful new world that the Court creates" is "one full of promise for administrative-law professors in need of tenure articles and, of course, for litigators."[142] He accused the majority of creating a "breathtaking novelty: judicial decisions subject to reversal by executive officers."[143] This new rule, he argued, is unconstitutional as it forces courts to issue advisory opinions.[144] The Court dismissed this accusation, noting that the judicial "precedent has not been 'reversed' by the agency, any more than a federal court's interpretation of a State's law can be said to have been 'reversed' by a state court that adopts a conflicting (yet authoritative) interpretation of state law."[145]

The analogy between federal courts construing state law and federal statutes administered by agencies became more apt in light of the Court's subsequent decision in *Negusie v. Holder*.[146] There, the Court was asked to consider whether the agency's interpretation of a persecutor bar to asylum relief was owed *Chevron* deference. The agency had interpreted the statutory provision to require denial of asylum to any otherwise qualifying noncitizen if he had persecuted others in his native country[147]—regardless of whether that participation in persecution was voluntary.[148] The Court concluded that *Chevron* deference did not apply because the agency had misread prior Supreme Court precedent and erroneously concluded it was bound by that precedent at *Chevron* step one.

In other words, the agency had not exercised any discretion to which

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141. *Id.* at 983. The majority opinion was joined in full by six members of the Court, with Justices Scalia, Souter, and Ginsburg dissenting. Justices Stevens and Breyer both filed concurring opinions. In a brief concurrence, Justice Stevens emphasized that the *Brand X* trumping power "would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity." *Id.* at 1003 (Stevens, J., concurring). Justice Breyer's concurrence took issue with an unrelated fight with respect to the deference owed under *United States v. Mead Corp.*, 533 U.S. 218 (2001). *See Brand X*, 545 U.S. at 1003–05 (Breyer, J., concurring).

142. *Brand X*, 545 U.S. at 1019 (Scalia, J., dissenting).

143. *Id.* at 1016.

144. *See id.* at 1017–19 & nn.12–13 (noting that an agency will be able to disregard a prior construction of a statute espoused by the Court and seek *Chevron* deference for its contrary construction in another case).

145. *Id.* at 983–84 (majority opinion).

146. 555 U.S. 511 (2009).

147. 8 U.S.C. §1101(a)(42) (2006) ("The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.").

148. *Negusie*, 555 U.S. at 514.

Chevron deference would apply. Instead of reaching the question itself,[149] however, the Court remanded the question to the agency to consider in the first instance:

> Having concluded that the [Board of Immigration Appeals] has not yet exercised its *Chevron* discretion to interpret the statute in question, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." This remand rule exists, in part, because "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts."[150]

If an agency has not had an opportunity to exercise its *Chevron* discretion with respect to an ambiguous provision of the statute it administers, *Negusie* instructs that the ordinary course is for the court to remand the question to the agency. This application of the ordinary remand rule is strikingly similar to the practice of federal courts certifying state-law statutory interpretation questions to state supreme courts when they are questions of first impression.[151]

Negusie is significant here for an additional reason: Justice Scalia concurred in the outcome. Signaling perhaps a step back from his dissent in *Brand X*, Justice Scalia agreed that the agency should have the first

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149. Justice Stevens wrote separately to argue that the Court should have reached the question itself as the question is one of law to which the agency should receive no deference. *Id.* at 538 (Stevens, J., concurring in part and dissenting in part). Justice Thomas dissented, arguing that the statute unambiguously precludes any inquiry into whether the persecutor acted voluntarily. *Id.* at 542 (Thomas, J., dissenting).

150. *Id.* at 528 (majority opinion) (alteration in original) (quoting Gonzales v. Thomas, 547 U.S. 183, 186 (2006) (per curiam); *Brand X*, 545 U.S. at 980).

151. *See, e.g.*, Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) ("[Certification] does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism."). *See generally* Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157 (2003) (discussing the certification process by looking at Ohio courts). Professor Watts has taken this approach one step further and suggested an "interactive" approach where courts informally consult with the relevant agency when an action between two private parties involves an ambiguous statute the agency administers. *See* Watts, *supra* note 115, at 1025–47.

The Court has since reached a similar conclusion in a somewhat analogous context in *Conkright v. Frommert*. 130 S. Ct. 1640 (2010). There, the Court rejected the "'one-strike-and-you're-out' approach" in the Employee Retirement Income Security Act (ERISA) context and held that a court must apply the traditional deferential standard of review to an ERISA plan administrator's determination, even if the court had found a previous related interpretation by the administrator to be invalid. *Id.* at 1646–47, 1651–52. In other words, like the agency in *Brand X*, the Court appeared to hold in *Conkright* that a plan administrator's subsequent interpretation may trump a prior judicial interpretation of an ambiguous provision.

opportunity to construe the statute: "It is to agency officials, not to the Members of this Court, that Congress has given discretion to choose among permissible interpretations of the statute."[152] In other words, it seems that, for Justice Scalia, an agency is only out of luck when a court has weighed in on a statute before *Negusie* applied the *Ventura* ordinary remand rule to *Chevron* questions or when a court decides extraordinary circumstances justify departing from that ordinary remand rule. Agency officials, in Justice Scalia's view, "deserve to be told clearly whether we are serious about allowing them to exercise that discretion."[153]

Whatever the effect of Justice Scalia's concurrence in *Negusie* on his *Brand X* dissent, the juxtaposition of the opinions in *Clark* and *Brand X* (and *Negusie*) leads to a natural (though unstated) conclusion: modern avoidance plays no role at *Chevron* step one because it "functions as a means of choosing between" various interpretations,[154] whereas "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."[155] After all, *Brand X* held that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[156] And modern avoidance, by definition, is not implicated unless the statute does not unambiguously foreclose an interpretation that raises constitutional questions. Just as a reasonable agency interpretation trumps prior judicial precedent per *Brand X*, a court cannot trump a reasonable interpretation by an the agency, who is the "authoritative interpreter"[157] of the statute it administers, by invoking constitutional avoidance at *Chevron* step one.

B. Brand X *and Separation of Powers: No Modern Avoidance at* Chevron *Step Two*

After *Brand X*, the more difficult question is whether modern avoidance plays any role at *Chevron* step two. As discussed, Judge McConnell, writing

152. *Negusie*, 129 S. Ct. at 1170 (Scalia, J., concurring); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (describing *Chevron* deference as "an across-the-board presumption that, in the case of an ambiguity, agency discretion is meant").

153. *Negusie*, 129 S. Ct. at 1170.

154. Clark v. Martinez, 543 U.S. 371, 385 (2005) (emphasis omitted).

155. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 & n.11 (1984)).

156. *Id.* at 982–83.

157. *Id.* at 983.

for the Tenth Circuit in *Hernandez-Carrera*, held that it does: "the only 'permissible' construction is the reading which does not provoke a serious constitutional question."[158] Like Judge McConnell, Professor Bamberger agrees that, after *Brand X*, constitutional avoidance cannot apply at *Chevron* step one because "applying normative canons wholesale to statutory construction (whether characterized as formal step-one analysis or the functionally equivalent independent judicial judgment) would exceed the legitimate scope of judicial authority to interpret regulatory statutes."[159] Instead, modern avoidance should inform whether an agency's interpretation is reasonable at *Chevron* step two.

This approach, he argues, "can order decisionmaking to resolve important issues before they reach the judiciary" and "can induce agencies to engage their institutional strengths more fully" by incorporating normative concerns in policymaking in the first instance.[160] In other words, it is proper to apply modern avoidance at *Chevron* step two because the second step is concerned with normative policy judgments. This argument echoes Professor Gillian Metzger's observation that "[d]ecisions applying the constitutional avoidance canon to agency-administered statutes create similar incentives for agencies to take constitutional concerns seriously."[161] Indeed, Professor Bamberger argues that "[i]ncorporating normative canons [including modern avoidance] into the step-two reasonableness inquiry seems the only way to reconcile those tools' continued use in judicial review with *Brand X*'s rule."[162] Judge McConnell's and Professor Bamberger's careful approach has intuitive appeal and appears to be the most plausible way to find a place for modern constitutional avoidance within the *Chevron* framework.[163] And their approach addresses the

158. Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1251 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1011 (2009).

159. Bamberger, *supra* note 14, at 106.

160. *Id.* at 111.

161. Metzger, *supra* note 120, at 499; *accord* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1197 (2006) ("[I]f the reviewing court would predictably use a particular canon when construing the statute, then the agency has a tactical incentive to apply the canon even if the values supporting it apply only to the judiciary."). Professor Morrison's article aptly explores in more detail the Executive's independent and somewhat distinctive use of constitutional avoidance in executing the law. *See also* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005); H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006).

162. Bamberger, *supra* note 14, at 114.

163. Professor Bamberger's approach also underscores the importance of preserving the two-step approach to *Chevron* deference—an approach that has increasingly come under fire by scholars. *See, e.g.*, Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).

concerns raised in Part II.B regarding comparative institutional strengths, in that an agency is afforded the first opportunity to address the constitutional questions in a statute it administers.

But, in attempting to avoid potential constitutional questions in administrative law, the approach creates actual constitutional problems. If modern avoidance were applied at step two, a court's identification of potential constitutional concerns with one plausible interpretation could supplant an agency's adoption of that interpretation—even if, in the end, the agency's interpretation passed constitutional muster.[164] Not only would that discount the *Clark* Court's admonition that "[t]he canon is not a method of adjudicating constitutional questions by other means,"[165] it would do serious violence to the separation of powers among co-equal branches of government. The violence modern avoidance causes to the separation of powers between Congress and the Judiciary has been well chronicled in the literature. But in the administrative context, this violence extends to the separation of powers between the Executive and the Judiciary. After all, the President has the constitutional duty to "take Care that the Laws be faithfully executed."[166] And, as the Supreme Court has observed, "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[167]

As Professor William Kelley explains, modern avoidance strips the Executive of that constitutional authority:

> [W]henever the Court denies the Executive its preferred statutory reading on avoidance grounds, the practical effect is for the Court to dictate how the laws shall be executed, or, more precisely, how they shall not be. That arrogation by the Court creates the serious potential of violating Article II by displacing the President as the executor of the laws.[168]

In so doing, the court also "ignores the fact that the Executive has an independent and constitutionally mandated role in the discernment and articulation of constitutional meaning in connection with its execution of the laws."[169] Indeed, by displacing the Executive's interpretation with its own, the court removes any political accountability for those policy judgments. The *Chevron* Court found such accountability to be critical, noting that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[170] Such political

164. *See* Vermeule, *supra* note 5, at 1960–61.
165. Clark v. Martinez, 543 U.S. 371, 381 (2005).
166. U.S. CONST. art. II, § 3.
167. Bowsher v. Synar, 478 U.S. 714, 733 (1986).
168. Kelley, *supra* note 4, at 883.
169. *Id.* at 881.
170. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

accountability is of heightened importance in the modern avoidance context, where, in the court's judgment, the Executive has interpreted a statute to approach (though perhaps not exceed) constitutional limits.

Indeed, applying modern avoidance to an agency's interpretation of an ambiguous statute it administers frustrates the careful balance of powers between all three branches, as it was Congress in the first place that charged the Executive to interpret and implement the statute.[171] It does not appear that the Court has ever explicitly identified these constitutional effects of the modern avoidance canon.[172] It is worth noting, however, that the Court's wording of the *Chevron* rule hints that this separation of powers concern may have been at least an implicit factor: "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[173] To the extent the Court has not previously recognized this problem, it could serve as a compelling justification to clear up the confusion created by *DeBartolo*, *Solid Waste Agency*, and *Rust*.

Moreover, while the Court has not explicitly recognized the separation of powers concerns that modern avoidance pose for the Executive, it has suggested that the canon plays no role at *Chevron* step two. Indeed, far from giving this interpretative canon *Chevron*-displacing force, the Court has suggested that it is a helpful guidepost for courts, not a binding rule of interpretation on the Executive. In *Spector v. Norwegian Cruise Line Ltd.*, the Court explained that its invocation of the avoidance canon in *Clark* "simply informed the choice among plausible readings of § 1231(a)(6)'s text."[174] The Court drew a sharp distinction between the canon and what it called "implied limitations on otherwise unambiguous [text]." Such "implied limitations" include, the Court explained, the presumptions that, absent a clear statement, statutes do not apply extraterritorially or impose monetary liability on states.[175]

In other words, the difference between the modern avoidance doctrine

171. Kelley, *supra* note 4, at 872–73 ("The defects in the operation of the avoidance canon are particularly clear in the *Chevron* context, perhaps because the Executive has a congressional delegation of power behind its statutory interpretation. The *DeBartolo Corp.* rule, in other words, pits the Court not only against the Executive, but also against the congressional allocation of law-elaboration authority to the Executive.").

172. *See id.* at 869 (mentioning the Court's failure to "take[ ] note of these effects of the avoidance canon").

173. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996).

174. 545 U.S. 119, 140 (2005).

175. *Id.* at 139.

and clear statement rules "is the distinction between a canon for choosing among plausible meanings of an ambiguous statute and a clear statement rule that implies a special substantive limit on the application of an otherwise unambiguous mandate."[176] These latter sorts of implied, substantive limitations could well constrain agency discretion, just as the presumption against retroactivity limited agency discretion in *Bowen v. Georgetown University Hospital*.[177] By contrast, the mere possibility that a textually plausible interpretation of an ambiguous statute might present constitutional concerns in no way detracts from "*Chevron*'s premise" that "it is for agencies, not courts, to fill statutory gaps."[178]

Indeed, scholars have warned that the importation of normative canons into the *Chevron* framework would impermissibly strip an agency of its congressionally delegated law-elaboration authority. Professor Adrian Vermeule, for instance, has argued that judicial reliance on the "rich brew of judge-made canons and collateral sources" would "read[ ] agency deference out of the picture by narrowing agencies' gap-filling power to the residual area in which judicial tools run out."[179] Accordingly, he has counseled that, unless Congress "clearly says otherwise," courts should not employ any tools for resolving ambiguity but should defer to agency determinations regarding these normative values in policymaking.[180] Similarly, Professors Tom Merrill and Kristin Hickman have underscored that not only does modern avoidance undermine congressional delegation of difficult policy choices to the Executive; it "has the opposite effect of enlarging the scope of policymaking by courts at the expense of Congress and the agencies."[181] Another commentator has likewise noted that the "danger in applying substantive canons in Step Two is that it may lead to excessive discretion on the part of judges and defeat the purposes of *Chevron*."[182]

The main response to this argument appears to be two-fold. First, there is the argument that the threat of modern avoidance at *Chevron* step two creates incentives for agencies to take constitutional concerns seriously. Second, applying modern avoidance in the *Chevron* framework may help to prevent the "vetogates" problem: "The obvious consequence of the

176. *Id.* at 141.

177. 488 U.S. 204, 213–14 (1988).

178. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

179. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 206 (2006).

180. *Id.* at 201.

181. Merrill & Hickman, *supra* note 19, at 915.

182. Greenfield, *supra* note 67, at 53.

vetogates structure is that federal statutes are hard to enact. . . . If vetogates make statutes hard to enact, they make them doubly hard to repeal."[183] In other words, modern avoidance allows courts to avoid repealing statutes while preserving congressional intent to the greatest extent possible.

A closer examination of these arguments, however, reveals that neither is compelling in the administrative context. As to the former, all three branches of government have a duty to act within constitutional limits. But no branch has the constitutionally mandated duty to avoid constitutional questions. Nor does the Judiciary have the power to require another branch to avoid constitutional questions. As Professor Kelley explains, "Such treatment of a coordinate branch not only shows a lack of inter-branch comity, it positively turns *Marbury v. Madison* on its head."[184] By contrast, the threat of applying *classical* constitutional avoidance at *Chevron* step two should be sufficient to ensure that the Executive fulfills its constitutional duty to interpret statutes within actual constitutional limits. Moreover, the utility of normative canons like modern avoidance as "democracy-forcing rules" has been called into question due to their inability to affect congressional behavior.[185] Similar concerns apply to their ability to promote administrative deliberation, and it is doubtful that the benefits of any such deliberation would outweigh the increased decision costs[186] and unpredictable results that follow from allowing courts to apply modern avoidance to set aside otherwise reasonable agency interpretations.[187]

For similar reasons, proscribing—not prescribing—modern avoidance at *Chevron* step two actually assists in preventing the vetogates problem. Unlike Congress, agencies can respond more easily and swiftly to a court's invalidation of an agency's interpretation of a statute on constitutional grounds "because, burdensome though administrative procedures can be, they do not involve the same types of 'vetogates' entailed in getting legislation through Congress and signed by the President."[188] If the

183. William N. Eskridge, Jr., *Vetogates,* Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1448, 1453 (2008). It must be noted that Professor Eskridge did not argue that his vetogates framework encourages or discourages the use of modern constitutional avoidance in administrative law.

184. Kelley, *supra* note 4, at 868 (footnote omitted).

185. VERMEULE, *supra* note 179, at 198.

186. *See id.* at 215 ("The interpretive complexity shunted out of the judiciary would be managed at a lower cost by agencies.").

187. *See id.* at 209 ("Only a kind of blind confidence in judicial capacities could suggest that judges are systematically superior to agency administrators in determining what legislators intended, or what purposes an enacting majority meant to pursue, or what policy tradeoffs the statute made.").

188. Metzger, *supra* note 120, at 532.

agency's interpretation is struck down as unconstitutional, under *Brand X* the agency will be given another chance to construe the statute in a constitutional manner. The statute itself remains unaffected; there would be no legislative vetogates through which to jump. Utilizing modern avoidance to avoid striking down an agency's interpretation thus fails to advance the doctrine's main purpose: to prevent the statute from being struck down as unconstitutional. Perhaps for this reason, Professor Metzger has observed that "a partial remand of an agency decision does not pose the same danger of overturning careful political compromises as does application of the canon of avoidance."[189]

In all events, even if the prudential benefits of applying modern avoidance at *Chevron* step two outweighed their costs, which they do not, the separation of powers concerns discussed above would counsel against—if not outright prohibit—such an application.[190] Instead, under a *Brand X*

189. *Id.* at 533.

190. The political accountability concerns that motivate, in part, traditional separation of powers theory bear a striking resemblance to popular constitutionalism, in that judicial review historically was (and should continue to be) "a power to be employed cautiously, only where the unconstitutionality of a law was clear beyond doubt." LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 99 (2004); *see also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006) (arguing for a similarly narrow definition of judicial review but limiting the scope of the article to "judicial review of legislation, not judicial review of executive action or administrative decisionmaking"). As Dean Larry Kramer has meticulously chronicled and argued, judicial review historically began "as a 'political-legal' act, a substitute for popular resistance, required by the people's command to ignore laws that were ultra vires—though only when the unconstitutionality of a law was clear beyond dispute." KRAMER, *supra*, at 92. It was not until "the past generation or so," Dean Kramer explains, that "[c]onstitutional history was recast—turned on its head, really—as a story of judicial triumphalism. A judicial monopoly on constitutional interpretation is now depicted as inexorable and inevitable." *Id.* at 229. Popular constitutionalism thus counsels a return to the historically limited role of judicial review and the elimination of the notion of judicial supremacy in constitutional interpretation: "That means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means"; "Above all, it means insisting that the Supreme Court is our servant and not our master." *Id.* at 247–48. In sum, "The Supreme Court is not the highest authority in the land on constitutional law. We are." *Id.* at 248.

Note how modern avoidance turns popular constitutionalism on its head, from a theory of judicial review that required *no* doubt concerning *un*constitutionality to one that allows reconstruction of a statute where there is merely *any* doubt of *constitutionality*. To be sure, the Framers did not envision the administrative state we have today, and constitutional avoidance—even in its classical form—did not appear until the 1800s. But popular constitutionalism naturally supports a *Brand X* doctrine of avoidance. The Judiciary does not, and historically has not, had a monopoly on interpreting the Constitution. Nor, certainly, does popular constitutionalism's limited formulation of judicial review encompass

doctrine of constitutional avoidance, the only avoidance doctrine that should apply in the *Chevron* analysis is the classical form—i.e., an agency has the obligation to adopt a constitutional interpretation of an ambiguous statute it administers, and a court should strike down an agency's interpretation as impermissible if it is actually unconstitutional.

C. Separation of Powers Revisited Under Network Theory

These separation of powers considerations are perhaps better understood under Dean Rubin's network theory of government. Some explanation of the theory is required. In *Beyond Camelot*, Dean Rubin explains that traditional theories of American government fail to fully account for the role of the modern administrative state; instead, they "represent a mixture of the political thought of the Middle Ages and the political fantasies of that era, in particular the legend of Camelot."[191] Accordingly, theories of American government must be recalibrated to align with the reality of the expansive role of the modern administrative state.[192] To reconstruct the proper structure of American government, Dean Rubin embarks on a quasi-Cartesian thought experiment of "bracketing" traditional concepts used to describe American government.

First and foremost, Dean Rubin discards the traditional "branches of government" metaphor because it fails on numerous levels to capture the structure and relationship of American government.[193] The modern administrative state is not merely a subbranch of the Executive Branch. Some independent agencies are not even located in that branch; most agencies were created by the Legislative Branch, and the agencies have their roots in all aspects of the modern state. Nor is the accompanying

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the power to strike down a politically accountable branch's interpretation of legislation on the ground that the construction raises constitutional doubts. To the contrary, such a broad view of judicial review finds no historical support. By removing the weight of judicial supremacy, as popular constitutionalists advocate, "a different equilibrium [will] emerge, as a risk-averse and potentially vulnerable Court adjusts its behavior to greater sensitivity on the part of political leadership in the other branches." *Id.* at 253. This change in "the Justices' attitudes and self-conception as they went about their routine," *id.*, should include embracing a *Brand X* doctrine of avoidance.

191. RUBIN, *supra* note 22, at 6.

192. *Id.* at 35, 36 ("The advent of the administrative state, resulting from the articulation of structure and purpose that reached their tipping points about two centuries ago, has rendered the concepts we use to describe our government outdated. . . . In fact, the modern administrative state, in its articulation and its instrumentalism, is the way we take collective action to solve the enormous problems and achieve the even more enormous promises of modern life. As we advance into this new millennium, we need to reconcile ourselves to its existence, understand its underlying structure, and make it work.").

193. *Id.* at 43–48.

concept of separation of powers between the branches particularly accurate in light of the administrative state's overlap with all three branches. All three branches have the power to supervise and give certain commands to administrative agencies.

In place of the traditional "tree" metaphor, Dean Rubin proposes the more modern metaphor of a network where each government entity is a discrete unit within the network that has a defined role, operations, interconnectivity, and an ability to receive and give commands to other units:

> The network metaphor does not imply that there can be no limitations on a governmental unit's ability to issue assignments to other units. But those limits must be specifically argued for, not derived from an outmoded, pre-analytic image of government. One important limitation emerges from the structure of the network itself, in that each unit is linked only to certain other units. Thus, the network's design may provide that a given unit may only issue assignments over certain pathways, and only to certain other units that are generally designated as its subordinates. Indeed, the identity of an individual or unit as the subordinate of another individual or unit generally depends on the ability of the second unit to issue assignments to the first.[194]

Dean Rubin also brackets the concepts of "power" and "discretion" and replaces them with the concepts of "authorization" and "supervision."[195] In other words, Congress, agencies, and courts do not have some inherent power or discretion to perform certain actions; instead, they receive certain authorization to act or supervise from other governmental units and sources (including statutes and the Constitution itself). For instance, "the legislature authorizes, or designs, administrative agencies, and each agency typically authorizes a variety of subsidiary offices."[196] "When the legislature enacts a statute enforced by an administrative agency, it is authorizing the agency to act, but it can also be regarded as controlling the agency's operations. . . . Supervision within the administrative apparatus involves these same considerations."[197] Such supervision must be assigned and confined to that assignment.[198]

Network theory more precisely captures the expansive nature and role of the modern administrative state than the traditional separate branches metaphor. When network theory is substituted for the traditional branches

194. *Id.* at 63 (footnote omitted).

195. *See id.* at 91–94.

196. *Id.* at 93.

197. *Id.* at 105.

198. Similarly, Dean Rubin proposes that "the bracketed concept of law can be replaced, in the administrative state, with the alternative concept of policy and implementation." *Id.* at 203.

metaphor, outdated generalities concerning the Judiciary's role are similarly discarded—i.e., "that courts are the primary interpreters of law."[199] Indeed, under the network structure, "administrative agencies are generally the primary interpreters of statutes in the modern state, and most of these interpretations are never reviewed by the judiciary."[200] To understand the agency's authority, one must identify the inputs. In particular, Congress, under its Article I authority, authorizes the agency to administer a particular statutory scheme, which includes a policymaking role of filling the holes in the statute. Depending on the agency, it also may have executive authority under Article II to execute and elaborate the law.

One must do the same to understand a court's scope of authority to review agency action. Courts play a certain supervisory role over administrative interpretations of law, but that role is confined to the assignments given to them by other governmental units and sources, such as Congress or the Constitution. From Congress, courts obtain supervisory authority under the Administrative Procedure Act and often additional review authority from the substantive statute the agency administers. From the Constitution, courts have the duty and authority to ensure that an agency acts within constitutional limits.

By focusing on the sources of authority instead of outdated notions of separation of powers, the role of modern avoidance (or lack thereof) in the review of administrative interpretations of law becomes clear. The Constitution plainly does not authorize courts to invoke modern avoidance to overturn an agency's otherwise permissible interpretation of a statute Congress has authorized the agency to interpret. Nor has Congress authorized courts to invoke such doctrine as part of their supervisory role. To the contrary, Congress authorizes the agency to be the primary interpreter of a statute it administers, and an executive agency also has authority under Article II to execute the law in a manner it deems is constitutional. If Congress were to determine that modern avoidance is preferred in the administrative context, it could require the agency to comply with the doctrine with respect to a particular statute, or it could authorize the Judiciary to utilize modern avoidance as part of its supervisory role over agency action. To date Congress has done neither.[201]

199. *Id.* at 64.

200. *Id.*

201. Similarly, with respect to executive agencies, the President theoretically may also have authority under Article II to require an agency to apply modern avoidance when it construes statutes it administers.

IV. APPLICATIONS

Part II explored the application of this *Brand X* doctrine in one immigration context. But its application is not so limited. This Part briefly provides a few additional examples and accompanying musings. As these examples illustrate, this *Brand X* approach to constitutional avoidance has a wide-reaching application to a variety of administrative contexts.

A. Immigration and National Security Law

In addition to the administrative interpretation discussed in Part II, questions of constitutional avoidance abound in the immigration and national security context. This may be due, in part, to the fact that there are myriad undecided constitutional questions—or "phantom constitutional norms"—that have arisen in light of the constitutionally unsettled nature of the federal government's plenary power over immigration and national security.[202] Consider another recent (and related) example.

Under the Immigration and Nationality Act, the Attorney General has discretion to authorize continued detention "beyond the removal period" of a noncitizen "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal."[203] The Attorney General has promulgated regulations that require, among other things, post-order custody reviews by agency officials within 90 days, 180 days, and 18 months of confinement; if continued detention is no longer deemed necessary, the noncitizen is released on supervised release.[204]

When confronted with a challenge to these regulations in *Diouf v. Napolitano*, the Ninth Circuit invoked modern avoidance (erroneously at *Chevron* step one[205]) and found that the regulations raise constitutional doubts because they "do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter such as an immigration judge."[206]

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202. *See, e.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (discussing how invoking the plenary power doctrine without deciding whether it is indeed grounded in the Constitution has created a number of subconstitutional or phantom constitutional norms in immigration law).

203. 8 U.S.C. § 1231(a)(6) (2006).

204. *See* 8 C.F.R. § 241.4(k)(2)(ii)–(iii) (2011).

205. 634 F.3d 1081, 1090 n.11 (9th Cir. 2011). For the reasons set forth in Part III.A, the Ninth Circuit's holding that "the canon applies at *Chevron* step one, because it is 'a means of giving effect to congressional intent,'" *id.* (quoting Clark v. Martinez, 543 U.S. 371, 382 (2005)), cannot be squared with the Court's decisions in *Brand X* and *Clark*.

206. *Id.* at 1091.

"To address these concerns," the court ordered that "aliens who are denied release in their 180-day reviews must be afforded the opportunity to challenge their continued detention in a hearing before an immigration judge."[207]

The effect of the Ninth Circuit's application of modern avoidance is plain: the court in essence amended the agency's regulations without determining that there was an actual constitutional violation, much less remanding to the agency to allow it to exercise its own expert judgment and congressionally delegated discretion. Had the court applied the *Brand X* doctrine of constitutional avoidance, it would have been forced to answer the constitutional questions and thus accord proper deference to co-equal branches of government.

B. National Labor Relations Law

A second apt example is the regulation the Court confronted in *DeBartolo*.[208] The issue in *DeBartolo* was whether to accord *Chevron* deference to the National Labor Relations Board's construction of a provision in the National Labor Relations Act that prohibits union strikers from engaging in acts "to threaten, coerce, or restrain any person engaged in commerce."[209] The Board had construed the provision "to cover handbilling at a mall entrance urging potential customers not to trade with any retailers in the mall, in order to exert pressure on the proprietor of the mall to influence a particular mall tenant not to do business with a nonunion construction contractor."[210]

As discussed in Part I.C, the Court did not decide whether the Board's construction was constitutional and instead struck down the agency's interpretation under modern constitutional avoidance. Indeed, the Court strained to avoid providing an answer to the constitutional question:

207. *Id.* at 1092.

208. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988).

209. 29 U.S.C. § 158(b)(4)(ii) (2006); *see DeBartolo Corp.*, 485 U.S. at 574.

210. *DeBartolo Corp.*, 485 U.S. at 574.

> Had the union simply been leafletting the public generally, including those entering every shopping mall in town, pursuant to an annual educational effort against substandard pay, there is little doubt that legislative proscription of such leaflets would pose a substantial issue of validity under the First Amendment. The same may well be true in this case, although here the handbills called attention to a specific situation in the mall allegedly involving the payment of unacceptably low wages by a construction contractor.
>
> That a labor union is the leafletter and that a labor dispute was involved does not foreclose this analysis. We do not suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection.[211]

Instead of providing a definitive answer on the constitutionality of the Board's interpretation, the Court developed its own interpretation of the statute. The Court held that its own interpretation "not reaching the handbilling involved in this case is not foreclosed either by the language of the section or its legislative history" and thus was an appropriate substitution under modern avoidance.[212]

The point need not be belabored, but it is difficult to square the Court's substitution of its own interpretation in light of the deference rule set forth in *Chevron* and reinforced in *Brand X*—even less so in light of the separation of powers concerns raised by the Court's encroachment on the Board's congressionally delegated law-elaboration authority.[213] Had the Court instead applied the classical version of avoidance, the Court may well have upheld the Board's interpretation; or, more likely based on the Court's reasoning, the Board (and Congress) would have been in the same position as under modern avoidance except that the Board would have received a definitive answer on the constitutional question and an opportunity to adjust its interpretation accordingly. This case therefore further illustrates the substantial costs and the absence of any real benefits of applying modern avoidance under the *Chevron* framework.

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211. *Id.* at 576.

212. *Id.* at 588.

213. One interesting wrinkle here is that the National Labor Relations Board is an independent agency, *see Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743, 748 (7th Cir. 1945), and thus the constitutional separation of powers concerns may not be quite as compelling as in the case of an agency controlled by the President. *See* Kagan, *supra* note 37, at 2373–74 (arguing that agencies controlled by the President should receive greater deference than independent agencies due to political accountability factors).

C. Environmental Law

The same can be said of the question implicated in *Solid Waste Agency*.[214] At issue there was the U.S. Army Corps of Engineers's interpretation of § 404(a) of the Clean Water Act, which regulates the discharge of dredged or fill material into navigable waters.[215] The Corps had interpreted "navigable waters" to cover abandoned sand and gravel pits which provide habitat for migratory birds.[216] The Court held that the government did not have jurisdiction under the Clean Water Act to regulate isolated ponds and mudflats. Notwithstanding this ruling at *Chevron* step one, the Court also held that the Corps's interpretation was owed no *Chevron* deference because it raised serious constitutional questions under the Commerce Clause.[217] Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. While not opining explicitly on the Court's invocation of modern constitutional avoidance, Justice Stevens called the Court's refusal to accord *Chevron* deference "unfaithful" and argued that the Corps's interpretation was fully consistent with the Commerce Clause.[218] Justice Stevens's dissent makes the Court's gratuitous invocation of modern avoidance all the more puzzling.

But *Solid Waste Agency* was not the end of this story. Five years later the Corps's (arguably unchanged) interpretation of *navigable waters* returned to the Court in *Rapanos v. United States*.[219] The Court again rejected the Corps's interpretation, yet could not find five votes for an interpretation of its own. The four-Justice plurality argued that the Clean Water Act only covered permanent bodies of water with a continuous connection to waters of the United States.[220] Justice Kennedy advocated a case-by-case assessment of whether a particular wetland has a "significant nexus" to traditional navigable waters.[221] Justice Kennedy's position—which garnered only his vote—controlled because it was the narrowest interpretation.[222]

Yet, Professor Metzger has argued that the agency—exercising its

214. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).

215. 33 U.S.C. § 1344(a) (2006); *Solid Waste Agency*, 531 U.S. at 162.

216. *Solid Waste Agency*, 531 U.S. at 162.

217. *Id.* at 174.

218. *Id.* at 191, 196–97 (Stevens, J., dissenting).

219. 547 U.S. 715 (2006).

220. *Id.* at 742.

221. *Id.* at 782 (Kennedy, J., concurring).

222. *See, e.g.*, United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007) ("For the reasons stated below, we join the Seventh and the Ninth Circuits' conclusion that Justice Kennedy's 'significant nexus' test provides the governing rule of *Rapanos*.").

expertise and facing political accountability not encountered by the Court—may have chosen other available approaches, "such as exempting any wetlands and tributaries not clearly navigable waters in their own right, or creating a rebuttable presumption that wetlands adjacent to navigable waters or their tributaries are subject to regulation."[223] Indeed, in light of the *Brand X* doctrine of constitutional avoidance, the agency may yet be able to write another chapter in this story by advancing a new, less sweeping interpretation.

Chief Justice Roberts's concurring opinion in *Rapanos* also merits mention. The Chief Justice lamented that the Corps did not refine its "essentially boundless view of the scope of its power" in light of *Solid Waste Agency* and thus did not "provid[e] guidance meriting deference under our generous standards."[224] He further explained that "[g]iven the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the Environmental Protection Agency would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority."[225] These points are well taken. But perhaps the agency would have had more guidance from *Solid Waste Agency* had the Court there applied the classical canon of avoidance—and answered the constitutional question(s)—instead of applying the modern canon that dodged them.

D. Federal Election Law

Federal election law is another context in which modern avoidance has played a critical role, as Congress has delegated broad authority to the Federal Election Commission (FEC) to interpret federal election law. For instance, in *Chamber of Commerce v. FEC*,[226] the U.S. Court of Appeals for the D.C. Circuit was asked to evaluate the FEC's interpretation of "member" as used (but not defined) in the Federal Election Campaign Act. The FEC's interpretation "in effect limit[ed] 'members'—to whom a membership organization can convey political messages and solicitations—to individuals having the right to vote, directly or indirectly, for at least one member of the organization's highest governing body."[227] The D.C. Circuit noted that "the Supreme Court quite clearly recognized, by not attempting an 'exegesis,' that the word [*member*] has a range of possible meanings," but held that the FEC was owed no *Chevron* deference because "the

223. Metzger, *supra* note 120, at 533.
224. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).
225. *Id.*
226. 69 F.3d 600 (D.C. Cir. 1995).
227. *Id.* at 601; *see also* 2 U.S.C. § 431(9)(B)(iii) (2006); 11 C.F.R. § 114.1(e)(2) (2011).

interpretation the Commission has codified presents serious constitutional difficulties."[228] Indeed, the court appeared to extend modern avoidance as an obligation "to construe the statute to avoid constitutional difficulties if such a construction is not plainly contrary to the intent of Congress."[229]

Interestingly, the following year, when faced with a challenge to an FEC interpretation of a different statute, the D.C. Circuit refused to apply modern avoidance to trump *Chevron* deference because the court decided it could "easily resolve the [petitioners'] First Amendment challenges through the application of controlling precedent."[230] In light of this dichotomy, it may be fruitful to take a closer look at courts' decisions to invoke modern avoidance to determine in what instances they invoke it because they believe the agency's interpretation is actually unconstitutional and when they invoke it because there is reasonable doubt without such certainty. Such an inquiry is reminiscent of Professor Karl Llewellyn's eminent legal realist argument that interpretive canons often may be used to justify reasoning by other means.[231]

E. Federal Communications Law

A final example comes from federal communications law. Under the Public Telecommunications Act, broadcasters face an indecency ban that proscribes against "utter[ing] any obscene, indecent, or profane language by means of radio communication," which Congress has instructed the FCC to enforce between 6 a.m. and 10 p.m.[232] This statutory prohibition has prompted a number of Supreme Court decisions—the most recent of

228. *Chamber of Commerce*, 69 F.3d at 604–05.

229. *Id.* at 605.

230. Republican Nat'l Comm. v. FEC, 76 F.3d 400, 409 (D.C. Cir. 1996).

231. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950); *see also* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 648 (1992) (responding to Llewellyn and advancing a theory useful "in predicting when a judge will use a canon to decide a particular case, and when she will decline to invoke a canon, and choose instead to decide the case on some other grounds"). *See generally* John. F. Manning, *Legal Realism & the Canons' Revival*, 5 GREEN BAG 2D 283, 295 (2002) ("For many years, the force of Llewellyn's essay and the triumph of strong post-war intentionalism and purposivism made it possible for such questions [concerning the usefulness of normative canons] to be neglected. With the return of realist skepticism about legislative intent and purpose, questions about the consistency, rationality, and legitimacy of the canons can no longer be ignored.").

232. 18 U.S.C. § 1464 (2006); Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (codified at 47 U.S.C. § 303 note (2006) (Broadcasting of Indecent Programming; Federal Communications Commission (FCC) Regulations)).

which is *FCC v. Fox Television Stations, Inc.*[233]

In *Fox*, the Court, with Justice Scalia writing for a 5–4 majority, held that it was neither arbitrary nor capricious for the FCC to change its position and interpret the statutory indecency prohibition to cover the utterance of patently offensive words or phrases even if they are not sustained or repeated during the broadcast.[234] In reaching this conclusion, Justice Scalia rejected the application of the modern doctrine of constitutional avoidance to

> limit the scope of authorized executive action. In the same section authorizing courts to set aside "arbitrary [or] capricious" agency action, the Administrative Procedure Act separately provides for setting aside agency action that is "unlawful," which of course includes unconstitutional action. We think that is the only context in which constitutionality bears upon judicial review of authorized agency action.[235]

In other words, only the classical form of avoidance applies to authorized executive action. To be sure, Justice Scalia observed, in an accompanying footnote, that the Court had previously applied modern avoidance to statutory questions under *Chevron*.[236] But that does not mean the Court should continue to do so—especially in light of *Brand X* and *Norwegian Cruise Line*.[237]

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233. 129 S. Ct. 1800 (2009).

234. *Id.* at 1812, 1819.

235. *Id.* at 1812 (alteration in original) (quoting 5 U.S.C. § 706(2)(A) (2006)).

236. *Id.* at 1812 n.3. This discussion of constitutional avoidance was in response to Justice Breyer's suggestion in dissent that the Court should remand the matter to the agency and "ask the agency to reconsider its policy decision in light of the concerns raised in a judicial opinion." *Id.* at 1840 (Breyer, J., dissenting). Justice Scalia responded that such a "strange and novel disposition would be entirely unrelated to the doctrine of constitutional avoidance, and would better be termed the doctrine of judicial arm-twisting or appellate review by the wagged finger." *Id.* at 1812 n.3 (majority opinion); *see also* Metzger, *supra* note 120, at 484 (discussing further this exchange in *Fox*).

237. While not invoking modern avoidance, the Court nevertheless avoided the constitutional question whether the FCC's orders and regulations interpreting the statute are constitutional. Justice Thomas, in his concurring opinion, argued that it may be time for the Court to revisit its precedents underlying the FCC's interpretation of the obscenity prohibition. *See Fox Television Stations, Inc.*, 129 S. Ct. at 1819–22 (Thomas, J., concurring) (questioning *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)). The Second Circuit had not reached the constitutionality of the FCC's interpretation, so the Court declined to address the constitutional questions raised by the parties. The Court noted that "whether it is unconstitutional, will be determined soon enough, perhaps in this very case." *Id.* at 1819 (majority opinion). Indeed, the Second Circuit, on remand, confronted the constitutional issue directly and held that "the FCC's policy violates the First Amendment because it is unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here." Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 319 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011).

CONCLUSION

This Article has demonstrated why the modern doctrine of constitutional avoidance should never have been applied in the administrative context where a court is charged "to accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."[238] The reasons are twofold: First, there are the practical considerations that, while courts are well equipped to decide whether an interpretation is actually constitutional, agencies are often better equipped to address the constitutional questions in the ambiguous statutes they administer by filling the holes with procedural safeguards and substantive criteria. Second, when a court displaces an agency's preferred (and constitutional) interpretation of a statute it administers with one the court believes better avoids constitutional questions, the court violates separation of powers—under both Article I and Article II. Yet courts, including the Supreme Court, have on occasion applied modern avoidance to trump *Chevron*. *Brand X* and its progeny should be viewed as providing an opportunity for courts to correct course.

Accordingly, at least in the administrative context, courts should discard the use of the modern form of constitutional avoidance and, in essence, return to the classical form. If an agency has exercised its discretion to provide an otherwise reasonable interpretation that raises constitutional questions, a court must determine whether that interpretation is indeed unconstitutional and thus impermissible under *Chevron* step two. Otherwise, Congress's delegation of authority—as well as the Executive's fulfillment of its constitutional duty to execute the law—should be accorded proper deference. This is not only the more prudent course of action, but also the constitutional one.

The Supreme Court has granted certiorari and will have the last word on this issue.

238. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 & n.11 (1984)).